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Migration Emergencies

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Migration emergencies are a commonplace feature in contemporary headlines. Pundits offer a variety of causes provoking these emergencies. Some highlight the deadly risks of these journeys for the migrants. Many more express alarm at the potential threats these mass influxes pose to their destination countries. But few question whether these migrant flows are, as commonly portrayed, unexpected and unpredictable. This Article asks whether these migration emergencies are surprising events or the logical and foreseeable outcomes of the structural failures of the global migration system. In particular, it interrogates the architecture of international migration law, arguing that the current framework is unsustainable in today's globalized world.

This is a story about the legal construction of crisis. Several literatures offer compelling insights into the construction of migration crises, but fail to explore the crucial role of international migration law. Scholars of forced migration view the legal framework as an inadequate response to crises but not as a root cause. Others have highlighted the role that crises play in the development of international law, demonstratring how crises impact law, but failing to examine how law helps to construct those crises.

This Article begins to unpack the role of international migration law in constructing migration "crises." International migration law, because it is codified in written instruments and nearly impossible to alter, entrenches sociocultural frames that might otherwise be substantially more flexible. International law has constructed a deeply path-dependent approach to international migration that not only obscures systemic inequality but also consumes alternate conceptions of morality. In response to this critique, this Article suggests a new approach to global migration law that aims to govern migrant flows more effectively. In short, it aims to establish international migration law as a separate subfield of international law rather than the afterthought that it currently represents.

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INTRODUCTION

The migration "crisis" is a commonplace feature in contemporary headlines. From African and Middle Eastern migrants crossing the Mediterranean in rickety vessels, to Central American children and families at the southern U.S. border, to Afghans and Iraqis aiming for Australian shores in overcrowded ships, stories of exodus and influx abound. Often, a specific trope prevails: This unexpected surge in migration is a crisis that threatens to overwhelm the destination country's capacity to process these migrants. Pundits offer a variety of causes provoking these emergencies. Some highlight the deadly risks of these journeys for the migrants. Many more express alarm at the potential threats these mass influxes pose to their destination countries. But few question whether these migrant flows are, as commonly portrayed, unexpected and unpredictable. This Article asks whether these migration crises are surprising events or the logical and foreseeable outcomes of the structural failures of the global migration system. In particular, it points to international law's failure to effectively govern migration flows, arguing that the current framework is unsustainable in today's globalized world.

This Article presents a story about the legal construction of crisis. The construction of crisis has been explored in a variety of literatures, including anthropology, political science, and sociology.[1] Anthropologists emphasize the social and cultural foundations of crises, and the ways in which these preexisting frameworks construct conditions of vulnerability.[2] They also foreground the frames employed to construct public knowledge about crises, and in particular the role of media in perpetuating underlying cultural preconceptions.[3] In explaining policy change, political scientists point to the social construction of policy crisis in order to effectuate such change.[4] Sociologists discuss the political construction of the U.S. border crisis generally[5] and the media construction of the Central American child migrant crisis specifically.[6] Though all of these theories offer compelling insights into the construction of migration crises, the architecture of international migration law plays a crucial role—one that the existing literature has failed to explore.

Popular conceptions of migration denote a stark contrast between refugees (those deserving of protection) and economic migrants (those who should be returned to their countries of origin).[7] Scholars of international migration law recognize that this binary does not adequately capture the range of reasons for migrating. There are many compelling drivers of migration that do not fall within the narrow international legal definition of a refugee. These scholars have coined the terms "survival migration"[8] and "crisis migration"[9] to describe the situation of migrants

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1. Legal scholars and social scientists have also examined the construction of immigrant "illegality" and the role of domestic immigration law and economic interests in creating that framework. *See, e.g.*, Cecilia Menjívar & Daniel Kanstroom, *Introduction* to CONSTRUCTING IMMIGRANT "ILLEGALITY": CRITIQUES, EXPERIENCES, AND RESPONSES 1, 4–6 (Cecilia Menjívar & Daniel Kanstroom eds., 2014). *See generally* KITTY CALAVITA, IMMIGRANTS AT THE MARGINS: LAW, RACE, AND EXCLUSION IN SOUTHERN EUROPE (2005) (discussing the legal construction of immigrant illegality); RUBEN ANDERSSON, ILLEGALITY, INC.: CLANDESTINE MIGRATION AND THE BUSINESS OF BORDERING EUROPE (2014) (discussing recent theories on immigration crises).

2. Anthony Oliver-Smith, *Theorizing Disasters: Nature, Power, and Culture*, *in* CATASTROPHE AND CULTURE: THE ANTHROPOLOGY OF DISASTER 23, 29 (Susanna M. Hoffman & Anthony Oliver-Smith eds., 2002) [hereinafter CATASTROPHE AND CULTURE] (discussing migration only in regard to natural and technological hazards).

3. Gregory V. Button, *Popular Media Reframing of Man-Made Disasters: A Cautionary Tale*, *in* CATASTROPHE AND CULTURE, *supra* note 2, at 143; Oliver-Smith, *supra* note 2, at 23, 29.

4. Mark K. McBeth et al., *The Social Construction of a Crisis: Policy Narratives and Contemporary U.S. Obesity Policy*, 4 RISK HAZARDS & CRISIS PUB. POL'Y 135, 136 (2014).

5. Néstor P. Rodríguez, *The Social Construction of the U.S.-Mexico Border*, *in* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 225 (Juan F. Perea ed., 1997).

6. Néstor Rodríguez & Cecilia Menjívar, *'Crisis' Label Deflects Responsibility for Migrant Children*, HOUSTON CHRON. (Aug. 26, 2014, 5:31 PM), http://www.chron.com/opinion/outlook/article/Rodriguez-Menjvar-Crisis-label-deflects-5714150.php.

7. *See, e.g.*, Somini Sengupta, *Migrant or Refugee? There Is a Difference, with Legal Implications*, N.Y. TIMES (Aug. 27, 2015), http://www.nytimes.com/2015/08/28/world/migrants-refugees-europe-syria.html?_r=0.

8. *See generally* ALEXANDER BETTS, SURVIVAL MIGRATION: FAILED GOVERNANCE AND THE CRISIS OF DISPLACEMENT (2013) (using the phrase "survival migration" to describe the crisis of displacement).

9. Susan Martin et al., *What Is Crisis Migration?*, 45 FORCED MIGRATION REV. 5, 5 (2014).

who flee humanitarian crises but do not fall within the scope of existing international law. These analyses foreground the limitations of international refugee law in protecting these migrants, but do not point to the architecture of international migration law as a driver of migration crises. Like the anthropologists, political scientists, and sociologists, they quite rightly attribute migration emergencies to a variety of causes, such as environmental change, food insecurity, and state fragility.[10] International migration law is viewed as an inadequate response to migration crises but not as a root cause. Other international legal scholars have highlighted the role that crises play in the development of international law.[11] This approach provides important insights, demonstrating how crises impact law, but fails to examine how law helps to construct those crises.

The goal of this Article is to begin to understand the legal construction of crisis through the case study of international migration law. More specifically, it seeks to add international migration law to the common list of factors to which migration crises are attributed. The concept of the legal construction of crisis owes an intellectual debt to scholars who have explored the roles of culture, media, and politics in obscuring the long-term systemic causes of "crisis" situations. These factors are constitutive of and deeply interwoven with international law and legal institutions. But international law has a specific role to play in constructing crisis. Codified in written instruments and nearly impossible to alter, international migration law entrenches outdated solutions to modern problems. The conceptual frameworks created by the law occupy the debate, crowding out creative, novel, or simply different approaches. International law has constructed a deeply path-dependent approach to international migration that obscures systemic inequality while at the same time consuming alternate conceptions of morality. In response to this critique, this Article suggests a new approach to global migration law that aims to govern migrant flows more effectively. In short, it aims to establish international migration law as a separate subfield of international law rather than the afterthought that it currently represents. This approach would anticipate and address migration flows proactively, enabling safe transit for migrants of all kinds.

The Article begins with selected examples of migrant influxes from around the world, focusing on the crisis rhetoric used by the media to describe these voyages. It then draws upon existing literature on the cultural, political, and social construction of crisis to argue that these migration "crises" are actually predictable consequences of the international migration

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10. *See generally* BETTS, *supra* note 8 (describing how environmental change, food insecurity, and violence lead to forced massive waves of survival migration); *see also* Jane McAdam, *The Concept of Crisis Migration*, 45 FORCED MIGRATION REV. 10 (2014) (pointing to social, political, economic, and environmental factors as causes of crisis migration).

11. *See infra* notes 73–76 and accompanying text.

law framework. The migration flows that result in mass influx are foreseeable responses to cycles and structures of violence as well as cyclical labor migration flows. In the former case, the migration stream grows steadily over time with ample warning, but at some point is transformed into a "crisis" that grabs public attention. In the latter case, these migration cycles have often occurred for many years and meet predictable labor needs within destination countries.

In other words, these migration flows need not necessarily lead to migration "crises." This Article argues that these crises are constructed by the architecture of the international migration law framework, which is excessively dependent on the antiquated refugee regime. Created as a temporary regime in the wake of World War II,[12] the Refugee Convention and its principle of *non-refoulement* were intended to protect political dissidents fleeing the Soviet bloc and Jews fleeing Nazi Germany.[13] Since then, the concept of *non-refoulement* has proliferated through a variety of instruments of international and regional human rights law, from the Convention Against Torture to the European Convention on Human Rights.[14] The overwhelming success of this principle has led to its domination of the field of international migration law.

International refugee law's impressive power benefits only a select group of migrants who can fit within the narrow definition it lays out. Only those individuals who fear that they will be targeted for serious mistreatment because of their race, religion, nationality, political opinion, or membership in a particular social group and whose government is unwilling or unable to protect them against such harm are protected under the Refugee Convention.[15] Member states place additional substantive and

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12. *See* United Nations 1951 Convention Relating to the Status of Refugees art. I(A), July 28, 1951, 19 U.S.T. 6259 (entered into force Apr. 22, 1954) [hereinafter 1951 Refugee Convention] (defining a refugee as anyone who has fled "as a result of events occurring before 1 January 1951" or was already considered a refugee under previous legal arrangements and conventions dating from the 1920s and 1930s). This temporal limitation was removed by the 1967 Protocol Relating to the Status of Refugees. United Nations Protocol Relating to the Status of Refugees art. I(2), opened for signature Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered into force with respect to the United States on Nov. 1, 1968) (omitting "as a result of events occurring before 1 January 1951" language from the refugee definition). The Protocol has 146 state parties. *Protocol Relating to the Status of Refugees*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en (last visited Mar. 11, 2017); *see* Jean Galbraith, *Temporary International Legal Regimes as Frames for Permanent Ones*, *in* NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 2014, BETWEEN PRAGMATISM AND PREDICTABILITY: TEMPORARINESS IN INTERNATIONAL LAW 41, 55 (Mónika Ambrus & Ramses A. Wessel eds., 2015).

13. The 1951 Refugee Convention also aimed to assist others fleeing fascist regimes, such as Spanish republicans. Guy S. Goodwin-Gill, *The Politics of Refugee Protection*, 27 REFUGEE SURV. Q. 8, 15–18 (2008).

14. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, June 26, 1987, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221.

15. 1951 Refugee Convention, *supra* note 12, arts. 1(A)(2), 33(1). Article 1(C)–(F) lists the conditions under which individuals who meet the definition of a refugee may be excluded from protection or may face cessation of protection.

procedural restrictions on this definition, limiting access to those who, for example, can establish that they are not safe in any part of their home country, and filed their asylum claim within a year of entering the host country.[16] The *non-refoulement* principle was expanded by the United Nations ("U.N.") Convention Against Torture to include those at serious risk of suffering torture at the hands of or with the acquiescence of a government official.[17] It is not hard for the reader to imagine other compelling reasons why people might leave their country of origin—manmade or natural environmental disasters, famine, or generalized civil strife, to name a few. Individuals migrating for these reasons are barely addressed, let alone protected, by international law.

This framework—a field dominated by the principle of *non-refoulement* but with little additional structure—constructs crisis. It requires migrants to access state territory in order to seek asylum, encouraging risky journeys by people who move for a complex set of reasons but must articulate a valid claim of *non-refoulement* in order to obtain lawful status. At the same time, the rhetoric of international refugee law obscures domestic and regional exclusion regimes built to prevent migrants from reaching countries where they might obtain international protection or where their labor is needed. In other words, this is not simply the problem of a legal regime that does not adequately respond to the problem it seeks to solve. This is a legal regime that *at the same time* lures migrants with the promise of lawful status if they can enter territory and prove themselves to be refugees, while diverting the debate away from the migration laws that offer few other legal grounds for migration and the powerful externalized border controls that make it extremely difficult for migrants to reach their destinations safely. One can imagine a legal regime that anticipated migration flows and enabled safe and lawful movement for migrants of all types. The current system is the opposite: It creates the conditions that encourage mass flows of migrants to show up at the borders of Australia, Europe, and the United States.

The single minded focus on whether migrants in mass influx situations fit within the legal definition of a refugee has become deeply problematic as an approach to international migration. Debates center on who is a refugee and who is an economic migrant, without much thought as to whether these categories are appropriate for contemporary migration issues—issues that are very different from those facing the world in the 1950s. Lawyers and the broader public engage in arguments about whether these migrants fit within the murky legal definition of a particular social group rather than engaging in discussion concerning far more important questions about who should be able to migrate globally

16. *See, e.g.*, 8 U.S.C. § 1158(a)(2)(B)–(D) (2006); 8 C.F.R. §§ 208.4(a), 208.13(b)(1)(i)(B) (2010).
17. Convention Against Torture, *supra* note 14, art. 3.

and why.[18] Absent from the calculus entirely are the exceedingly dangerous journeys that migrants are forced to undertake in order to sit in front of an adjudicator who will decide whether they fit within the limits of this definition. The perspectives of the migrants themselves are simply not part of the relevant international legal framework. This troublingly path-dependent approach looks backwards rather than forwards, diverting attention away from questions of global structural inequality.

Further compounding the problem, international refugee law does not address the question of how to process migrants in situations of mass influx—what this Article refers to as migration "crises." The Refugee Convention and the Convention Against Torture require states to adopt substantive legal standards, but stop short of offering binding requirements governing the process through which asylum claims are determined. This oversight leaves sizeable gaps in the standard asylum determination process, and creates even larger problems in situations of mass influx. After discussing the refugee definition, this Article unearths the legislative history—or *travaux preparatoires*—revealing that the drafters of the Refugee Convention recognized but refused to address mass influx situations. This void of international legal guidance on mass influx compounds the migration "crisis" constructed in part by the limited definition of a refugee.

In addition to these substantive and procedural limitations, international refugee law does not provide access to territory (known as the "right to asylum"). Rather than creating a process to enable safe and orderly movement of people, the international legal regime requires migrants to make their way into the country in which they seek protection.[19] This structural feature of international refugee law has also played a role in encouraging mass movement of migrants.

In these ways, the international migration law framework constructs crisis. Rather than adapting responses to current needs of migrants and capacities of states, contemporary problems are shoehorned into an outdated legal regime. Instead of anticipating migration flows away from conflict zones and constructing practical solutions before these movements become massive, the structure of international migration law encourages migrants to undertake risky voyages away from their home country in hope of being granted refugee status once they cross the border into a host state. Instead of encouraging and assisting wealthy nations to provide safe and lawful migration routes to fulfill predictable labor needs, international

18. *See* Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, 34 BERKELEY J. INT'L L. 1, 1 (2016).

19. After obtaining refugee status in a host state in the developing world, some refugees are resettled to the developed world. Resettlement is an extremely rare option for refugees. In 2014, there were nearly eleven million refugees in the world, but only 105,000 refugees were resettled. U.N. HIGH COMM'R FOR REFUGEES, UNHCR STATISTICAL YEARBOOK 2014 43 (14th ed. 2015).

migration law offers few options for these economic migrants. As long as the demand for labor exists in the developed world and the need for protection from violence exists in the developing world, this formula will regularly and predictably lead to mass influx—migration "crises."

This Article concludes by suggesting a blueprint for reforming the international migration law system. In terms of process, a carefully crafted temporary regime—a binding legal agreement with an expiration date—may be a necessary first step to a more robust permanent regime.[20] In terms of content, this Article offers several recommendations. Migration flows should be anticipated and expected, and safe passage must be part of any regime. The new regime should be cross-cutting, recognizing the migrant as a complex human being who may be seeking both protection needs and labor opportunities. Above all, international law must play a more robust role in regulating migration. The perils of contemporary migration flows for both migrants and host states make this gap abundantly clear.

I. The Rhetorical Foundations of Crisis

Migration crises loom large in the public consciousness of developed nations.[21] Media reports frequently attach the label "crisis" when describing the arrival of undocumented migrants via land and sea to the borders of the United States, the European Union, and Australia. The Guardian newspaper describes irregular migration into Europe as a "permanent crisis," and the situation during the summer of 2015 as "a crisis of unprecedented dimensions."[22] In 2015, more than one million migrants arrived at the sea borders of the European Union.[23] The vast majority of these migrants were fleeing longstanding violent conflicts in Afghanistan, Eritrea, Iraq, Somalia, or Syria.[24] Migrant flows have increased steadily

20. To be clear, this Article proposes a temporary legal regime, and does not prescribe temporary legal status for migrants governed by this regime. While some migrants subject to the regime (such as certain types of labor migrants) may hold only temporary status, vulnerable migrants seeking protection may require more durable solutions. In any case, these are details that will need to be determined by the stakeholders in the temporary regime rather than imposed ex ante.

21. Keyboarding the words "migration" and "crisis" in a September 2016 Google search (conducted by the Author of this Article) provided over sixty-five million hits.

22. Mark Rice-Oxley & Peter Walker, *Europe's Worsening Migrant Crisis*, Guardian (May 5, 2015, 7:16 AM), http://www.theguardian.com/uk-news/2014/sep/18/-sp-world-briefing-europe-worsening-migrant-crisis; Angela Merkel, Opinion, *The Guardian View on Europe's Refugee Crisis: A Little Leadership, at Last*, Guardian (Sept. 1, 2015, 1:18 PM), http://www.theguardian.com/commentisfree/2015/sep/01/guardian-view-on-europe-refugee-crisis-leadership-at-last-angela-merkel; *see* Rick Lyman, *Treatment of Migrants Evokes Memories of Europe's Darkest Hour*, N.Y. Times (Sept. 4, 2015), https://www.nytimes.com/2015/09/05/world/treatment-of-migrants-evokes-memories-of-europes-darkest-hour.html ("Europeans are facing one of the Continent's worst humanitarian crises since World War II . . . .").

23. *Refugees/Migrants Response - Mediterranean*, U.N. High Commissioner for Refugees, http://data.unhcr.org/mediterranean/regional.html (last visited Mar. 11, 2017).

24. *Id.* Eighty percent of the migrants came from these five countries, and at least 2800 of these migrants died or went missing on the journey. *Id.*

over several years; these have not been overnight changes. To take one example, the first refugee camps for Syrians opened in Turkey in May 2011, and by March 2013, Syria's neighbors were hosting one million Syrian refugees.[25] By July, referring to Syrian migrants, the U.N. High Commissioner for Refugees ("UNHCR") warned the U.N. Security Council that the world had not seen such a rapidly escalating refugee outflow since the Rwandan genocide nearly twenty years earlier.[26]

In June 2014, President Barack Obama described the arrival of Central American child migrants at the southwest border as "an urgent humanitarian situation requiring a unified and coordinated Federal response."[27] U.S. Customs and Border Patrol reports that it apprehended just over 68,000 unaccompanied children from Central America and Mexico in fiscal year 2014.[28] These children were fleeing pervasive gang violence in their home countries: Children from Honduras, El Salvador, Guatemala, and Mexico faced, respectively, the first, second, seventh, and thirteenth highest murder rates in the world.[29] The numbers of children arriving had been increasing steadily since fiscal year 2012, when they rose fifty-two percent compared to the prior year.[30] In fiscal year 2013 the numbers increased by sixty percent, and by seventy-seven percent in fiscal year 2014.[31]

In September 2013, Prime Minister Tony Abbott won the Australian elections on a platform that promised to "stop the boats" of undocumented arrivals.[32] Australian media has described the arrival of just over 50,000 asylum seekers by boat between 2008 and 2013 as an

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25. *Fact Sheet: Timeline and Figures*, U.N. HIGH COMMISSIONER FOR REFUGEES, http://www.unhcr.org/5245a72e6.html (last visited Mar. 11, 2017).

26. Leo R. Dobbs, *UNHCR Chief Urges States to Maintain Open Access for Fleeing Syrians*, UNHCR (July 16, 2013), http://www.unhcr.org/51e55cf96.html.

27. Press Release, White House Office of the Press Sec'y, Presidential Memorandum—Response to the Influx of Unaccompanied Alien Children Across the Southwest Border (June 2, 2014), https://www.whitehouse.gov/the-press-office/2014/06/02/presidential-memorandum-response-influx-unaccompanied-alien-children-acr (directing the Secretary of Homeland Security to establish an interagency group to coordinate responses by federal agencies).

28. U.S. BORDER PATROL, *Southwest Border Sectors: Family Unit and Unaccompanied Alien Children Apprehensions (FY 2014–FY 2016)*, https://www.cbp.gov/sites/default/files/assets/documents/2016-Oct/BP%20Southwest%20Border%20Family%20Units%20and%20UAC%20Apps%20-%20FY16.pdf (last visited Mar. 11, 2017).

29. *Intentional Homicides (per 100,000 People)*, WORLD BANK, http://data.worldbank.org/indicator/VC.IHR.PSRC.P5?order=wbapi_data_value_2012+wbapi_data_value+wbapi_data_value-last&sort=desc (last visited Mar. 11, 2017) (measuring and globally ranking intentional homicides per 100,000 people in 2014: Honduras at seventy-five was ranked first; El Salvador at sixty-four was ranked second; Guatemala at thirty-one was ranked seventh; and Mexico at sixteen was ranked thirteenth).

30. *Id.*

31. *Id.*

32. Alison Rourke, *Tony Abbott, the Man Who Promised to 'Stop the Boats,' Sails to Victory*, GUARDIAN (Sept. 7, 2013, 12:58 PM), https://www.theguardian.com/world/2013/sep/07/australia-election-tony-abbott-liberal-victory.

"illegal immigrant crisis."[33] More recently in that region, between January 2014 and June 2015, over 90,000 migrants attempted to cross the Bay of Bengal seeking safety in Indonesia, Malaysia, and Thailand.[34] Many of these migrants were Rohingya Muslims who had fled severe sectarian violence that erupted in Myanmar in June and October 2012.[35] In response to efforts by Thailand to crack down on smuggling, traffickers abandoned ships carrying approximately 8000 of these migrants who were left stranded at sea.[36] This situation engendered the moniker "Rohingya migrant crisis."[37]

But just what does "crisis" mean? A brief example demonstrates the manipulability of the term. Perhaps the most common and reasonable assessment is that the large waves of migrants threaten to overwhelm state institutions related to border enforcement, migration status assessment, and a variety of other benefits—thus a crisis of state resources. While it is true that existing institutions have been overwhelmed by the absolute numbers of migrants, these migrant flows are small in relative terms: The migrant flows described above constituted approximately 0.2% of the European Union's population,[38] 0.02% of the U.S. population,[39] and 0.2% of Australia's population.[40] These are wealthy destination nations whose financial capacity and expertise could enable them to process even larger numbers of migrants if they so chose.[41] Had more resources been devoted to anticipating and processing migration flows, these states might have created institutions capable of managing those flows without becoming

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33. BOB DOUGLAS ET AL., BEYOND THE BOATS: BUILDING AN ASYLUM AND REFUGEE POLICY FOR THE LONG TERM 17 (2014); Editorial, *Illegal Immigrant Crisis Needs Fixing*, HERALD SUN (MELB.) (Nov. 20, 2011, 5:00 AM), http://www.heraldsun.com.au/news/opinion/illegal-crisis-needs-fixing/news-story/e28a6859a8eb8ad5112afd3ef9acfe4c.

34. *Southeast Asia Migration Routes 2015*, INT'L ORG. FOR MIGRATION, http://www.iom.int/sites/default/files/infographic/image/Southeast-Asia-Migration-Routes-16-June-2015.jpg (last visited Mar. 11, 2017).

35. AMNESTY INT'L, DEADLY JOURNEYS: THE REFUGEE AND TRAFFICKING CRISIS IN SOUTHEAST ASIA 12 (2015).

36. *Id.* at 10.

37. Eleanor Albert, *CFR Backgrounders: The Rohingya Migrant Crisis*, COUNCIL ON FOREIGN REL. (last updated Jan. 12, 2017), http://www.cfr.org/burmamyan mar/rohingya-migrant-crisis/p36651.

38. *Mediterranean Update: Missing Migrants Project*, INT'L ORG. FOR MIGRATION (Sept. 3, 2015), http://missingmigrants.iom.int/sites/default/files/Mediterranean_Update_3_September.pdf; *Population and Population Change Statistics*, EUROSTAT, http://ec.europa.eu/eurostat/statistics-explained/index.php/Population_and_population_change_statistics (last visited Mar. 11, 2017) (estimating the population of the EU-28 at 510.1 million on January 1, 2016).

39. *See U.S. and World Population Clock*, U.S. CENSUS BUREAU, http://www.census.gov/popclock/ (last visited Mar. 11, 2017) (providing that the U.S. population on September 30, 2014, the last day of fiscal year 2014, was 319,636,028).

40. *Australian Demographic Statistics*, AUSTL. BUREAU OF STAT. (last updated Dec. 15, 2016, 11:30 AM), http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0 (indicating that the Australian population on December 31, 2013 was 23,295,400). The site also lists the December 31, 2014 population as 23,625,600 people, which was an increase of 330,200 since Dec. 31, 2013. *Id.*

41. For a similar argument in the context of Syrian refugee relief, see E. Tendayi Achiume, *Syria, Cost-Sharing, and the Responsibility to Protect Refugees*, 100 MINN. L. REV. 687 (2015).

overwhelmed. In other words, this is arguably a crisis created by infrastructure choices, not a crisis of absolute capacity.

The rhetoric of crisis is deployed on both sides of the debate and amplified by the media. In the short-term, crisis rhetoric is powerful, highlighting the importance of both the situation and the relevant players and their perspectives. Contestation over what type of crisis we have on our hands is therefore fierce. But in the long-term, the use of the label "crisis" obscures long-term systemic causes of situations of vulnerability and peril, framing them instead as isolated incidents that somehow snuck up on us.

The influx of child migrants to the southwestern U.S. border in 2014 provides an example of these phenomena. Texas Governor Rick Perry was widely cited arguing that the "humanitarian crisis" could become a "monumental tragedy" if these undocumented children were not returned to their home countries as soon as possible. This risk was used to justify his decision to send 1000 military reservists to the border, and the crisis itself was of course an opportunity for a presidential hopeful to take the national stage.[42] Representative Michael McCaul (R-TX), the Chairman of the House Committee on Homeland Security, described the situation to Congress as "an escalating refugee and national security crisis."[43] This framing of crisis mirrored Perry's approach: The danger to children posed by a humanitarian or refugee crisis is outweighed by the potential crisis of national resources and border control.

Representative McCaul's written testimony explored the causes of the crisis, focusing on the short-term and politically expedient.[44] Though acknowledging that the economic conditions and violence in Central America played some role in the migrants' decision to leave, he emphasizes the role of President Obama's Executive Actions in encouraging parents to send their children to the United States. McCaul highlights the role of drug cartels in smuggling children and pays lip service to the danger that this poses to the children, but concludes that the solution to the problem is more deterrence and a more secure southern border.[45] There is of course no discussion of the American appetite for drugs that fuels the cartels or of the long-term causes of the extreme violence gripping the Northern Triangle countries of El Salvador, Guatemala, and Honduras.

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42. *Perry Warns Humanitarian Crisis Could Become 'Monumental Tragedy*,' NBC NEWS (July 3, 2014, 11:41 AM), http://www.nbcnews.com/watch/nbc-news/perry-warns-humanitarian-crisis-could-become-monumental-tragedy-295951939641.

43. Michael McCaul, Chairman, Comm. on Homeland Sec., Crisis on the Texas Border: Surge of Unaccompanied Minors, Opening Statement Before the House Committee on Homeland Security (July 3, 2014) (statement of Representative Michael McCaul (R-Texas)), https://homeland.house.gov/files/documents/07-03-14-McCaul-Open.pdf.

44. *Id.*

45. *Id.*

On the other side of the debate, the crisis rhetoric is deployed to mobilize resources, both public and private. Lutheran Immigrant and Refugee Services described the situation as an "unprecedented . . . large-scale disaster that calls for an immediate and generous response."[46] This statement was made in support of a funding campaign seeking individual donations as well as the allocation of emergency funds by the executive and the legislature. While short-term resources are inarguably necessary to assist these children, the rhetoric of crisis frames the situation as exceptional and obscures the systemic causes of the problem.

Other advocates for the children used the crisis label to stake out the moral high ground. Maribel Solace, a member of Dreamers' Moms, said, "[t]his is a humanitarian crisis, and here in San Diego we welcome kids. We will help them with all of our resources."[47] The use of crisis here refers to the situation the children are fleeing and to the treatment they have received in other parts of the United States. But the use of the label still implies that the arrival of unaccompanied children from the Northern Triangle was an unexpected and novel event. Yet the truth is that tens of thousands of minors have travelled to the United States since at least fiscal year 2009, and numbers have been steadily increasing over the past several years.[48]

Four days after President Obama used the term "an urgent humanitarian *situation*"[49] to describe the arrival of unaccompanied minors, the Christian Science Monitor injected the rhetoric of emergency, quoting the President as using the language "urgent humanitarian *crisis*."[50] President Obama chose, presumably deliberately, not to apply the label "crisis" to the situation at the border. He instead invoked milder policy rhetoric to justify the need for a coordinated federal response.[51] Yet even responsible mainstream media could not resist transforming the

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46. Paul Bedard, *Crisis: 'Unprecedented' Number of Young Illegal Immigrants Pouring over U.S. Border*, WASH. EXAMINER (May 27, 2014, 1:50 PM), http://www.washingtonexaminer.com/crisis-unprecedented-number-of-young-illegal-immigrants-pouring-over-u.s.-border/article/2548937.

47. Pablo J. Sáinz, *Community Welcomes Immigrant Children to San Diego*, LA PRENSA SAN DIEGO (July 11, 2014), http://laprensa-sandiego.org/featured/community-welcomes-immigrant-children-to-san-diego/.

48. Dina Samir Shehata, *Border Violations*, AUSTIN CHRON. (Apr. 3, 2015), http://www.austinchronicle.com/news/2015-04-03/border-violations/; *Southwest Border Migration*, U.S. CUSTOMS & BORDER PATROL (last updated Jan. 18, 2017), http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children.

49. Katie Zezima & Ed O'Keefe, *Obama Calls Wave of Children Across U.S.-Mexican Border 'Urgent Humanitarian Situation*,' WASH. POST (June 2, 2014), https://www.washingtonpost.com/politics/obama-calls-wave-of-children-across-us-mexican-border-urgent-humanitarian-situation/2014/06/02/4d29df5e-ea8f-11e3-93d2-edd4be1f5d9e_story.html?utm_term=.70bc9ebe97ff (emphasis added).

50. Patrik Jonsson, *Border Crisis: Why the Surge in Illegal Border-Crossers with Children?*, CHRISTIAN SCI. MONITOR (June 6, 2014), http://www.csmonitor.com/USA/2014/0606/Border-crisis-Why-the-surge-in-illegal-border-crossers-with-children-video.

51. McBeth et al., *supra* note 4, at 135.

President's language before our very eyes to avail themselves of the rhetoric of crisis.

Similar examples can be drawn from the current situation in Europe. Those who welcome migrants and those who do not, political leaders on the left and the right, leverage crisis rhetoric to advantage their position. Though a line is often drawn between migrants and refugees, some politicians have explicitly rejected the language of crisis in favor of greater understanding of the long-term nature of the situation.

Crisis rhetoric has become a useful political tool for anti-immigrant parties in Europe, from the local to the national to the regional. In a small town near Padua, Italy, the mayor protested a request to host 100 migrants in a reception center because of the need to "stave off an unbearable invasion of migrants."[52] On a national level, to improve his declining popularity among his constituents, Hungarian Prime Minister Viktor Orban has engaged in the theater of crisis, from erecting a barbed wire fence along the border with Serbia and deploying troops to guard said wall to prohibiting migrants from entering railway stations.[53] He has also leveraged the European Union's slow response to the migrants' arrival as a European Union-wide stage from which he can portray himself, in contrast, as a strong leader and a euro skeptic.[54] U.K. Prime Minister David Cameron also used the situation to distance himself from the European Union, labeling it a "crisis facing the countries of Europe" rather than a European crisis.[55] The language of crisis is also useful for the corporations that run migrant detention centers. In the words of an Italian politician, "[i]nstead of approaching immigration with a firm plan, it is always treated like an emergency. That way, the people who control the contracts [for the immigration centres] make more money."[56]

The U.N. High Commissioner for Refugees has mastered emergency rhetoric, positioning prominently on its homepage the headline "Refugee Crisis in Europe" in large red block letters, followed by a picture of a child being rescued from the Mediterranean and a large red "donate now"

52. Giovanni Legorano & Liam Moloney, *Italian Towns Push Back on Growing Burdens of Europe's Migrant Crisis*, WALL ST. J. (Apr. 28, 2015, 11:50 AM), http://www.wsj.com/articles/italian-towns-push-back-on-growing-burden-of-europes-migrant-crisis-1430085784.

53. Simeon Djankov, *Viktor Orban Uses Migrant Crisis to Shore up His Sagging Popularity*, FIN. TIMES (Sept. 6, 2015), http://www.ft.com/intl/cms/s/0/93bf8e70-5486-11e5-b029-b9d50a74fd14.html#axzz3l5X31LT5.

54. *Id.*

55. Simon Nixon, *U.K.'s Cameron a Hostage in Migrant Crisis*, WALL ST. J. (Sept. 6, 2015, 4:33 PM), http://www.wsj.com/articles/u-k-s-cameron-a-hostage-in-migrant-crisis-1441571589.

56. Stephanie Kirchgaessner, *Tensions Run High in Rome's Suburbs as Italy Struggles with Migration Crisis*, GUARDIAN (July 26, 2015, 11:41 AM), http://www.theguardian.com/world/2015/jul/26/italy-migrant-crisis-rome-protests-tensions-casale-san-nicola.

button.[57] Similarly, Save the Children UK leads its website with the "Child Refugee Crisis Appeal," noting, "Europe is facing its worst refugee crisis since the Second World War . . . Please [D]onate . . . ."[58]

The European Union's High Representative, in contrast, pushed back against the crisis rhetoric:

> We are all facing a dramatic, a dramatic event. I don't say an emergency event, because this is not an emergency: it is an urgency we are facing, but it is not something that starts one day and finishes another day. It is here to stay and the sooner we accept it, politically and psychologically, the sooner we will be able to respond in an effective way and manage it in an effective way.[59]

But the European Union also draws a sharp distinction between migrants and refugees, explaining, "it is partially a migrant flow, but it is mainly a refugee flow, which puts us in a different situation when it comes to our legal and moral duties."[60]

The rhetoric of crisis is put to work by a variety of players in the migration context. It is a powerful and flexible label that can be employed to draw public attention to a diverse range of perspectives and goals. These benefits come with a price. Crisis rhetoric implies an unanticipated problem with a discrete cause rather than a long-term and systemic complex of issues. It entrenches the debate within the myopia of existing cultural and legal frames, discouraging deeper exploration of structural causes.

II. The Construction of Crisis

Migration events are classified as crises because of the utility of the rhetoric for a variety of actors. Stepping beyond the motivations of these actors, this Part explores the broader implications of the crisis label. It draws upon the anthropology, sociology, and political science literature, which point to the roles of culture, society, and politics in constructing crisis. These fields also offer critical insights on the ramifications of the crisis frame. International legal scholars have also explored the role of crisis in developing international law from descriptive and critical perspectives. This Part adds to both the interdisciplinary literature and the legal literature by teasing out the role of law in constructing crisis.

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57. U.N. High Commissioner for Refugees, http://www.unhcr.org/ [https://web.archive.org/web/20151001175102/http://www.unhcr.org/cgi-bin/texis/vtx/home] (last visited Mar. 11, 2017); *see Refugee/Migrants Responses - Mediterranean*, *supra* note 23.

58. Save the Children, www.savethechildren.org.uk [https://web.archive.org/web/20150929050512/http://www.savethechildren.org.uk/about-us/emergencies/child-refugee-crisis-appeal] (last visited Mar. 11, 2017).

59. Federica Mogherini, High Representative, E.U. Foreign Affairs & Sec. Policy/Vice-President, Remarks at E.U. Foreign Ministers Meeting (Sept. 5, 2015), http://eeas.europa.eu/statements-eeas/2015/150905_01_en.htm.

60. *Id.*

The term "crisis" belies a clear definition. As the previous discussion demonstrates, even when discussing a specific crisis, different actors may be pointing to different aspects of that situation in determining it to be a crisis. For some actors, humanitarian needs create a crisis. For others, national security risks create a crisis. The common thread is that the situation is grave, and that this gravity is unforeseen and perhaps unforeseeable. Crises and emergencies arise suddenly and grab the public's attention. These labels denote a new and urgent problem that requires an immediate response. This imminence is both a source of power and a dangerous blinder.

The crisis label transforms a situation from a process into an event.[61] Unmoored from context and cause, emergencies appear magically out of thin air. A crisis is like the whistle of a boiling kettle. The terrible high-pitched shriek demands immediate attention. The instinctual response is to yank the kettle off the stove to quell the wailing. Crisis averted. But we could stop it from happening again by removing the whistle and using a timer, buying an electric kettle, or using the microwave to heat the water. Yet once the noise has died down, we forget about the other options and return to the path of least resistance. Crises and their symptoms tend to overshadow formative processes, which are largely systemic in nature.[62] An urgent short-term problem obscures a larger and deeper rooted systemic problem, and suggests myopic solutions that avoid examining core causes.

Sociologists and linguists emphasize the socially, culturally, and historically contingent nature of crises.[63] In other words, crisis results not from an outside shock to a preexisting order, but from processes of crisis identification, definition, and construction.[64] As a result, narrative and discourse play important roles in bringing a crisis into existence.[65] These generative processes take place within dominant cultural frames, meaning that crises are defined according to the values of the politically powerful at the expense of the marginalized.[66] The voices of those made most vulnerable by the crisis are often excluded from the conversation.[67]

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61. Oliver-Smith, *supra* note 2, at 23; Benjamin Authers & Hilary Charlesworth, *The Crisis and the Quotidian in International Human Rights Law*, 44 NETH. Y.B. INT'L L. 19, 28 (2014).

62. Oliver-Smith, *supra* note 2, at 46.

63. Antoon De Rycker & Zuraidah Mohd Don, *Discourse in Crisis, Crisis in Discourse*, *in* DISCOURSE AND CRISIS: CRITICAL PERSPECTIVES 3 (Antoon De Rycker & Zuraidah Mohd Don eds., 2013).

64. Colin Hay, *Narrating Crisis: The Discursive Construction of the 'Winter of Discontent,'* 30 SOC. 253, 254 (1996).

65. De Rycker & Mohd Don, *supra* note 63; Carroll L. Estes, *Social Security: The Social Construction of a Crisis*, 61 MILBANK MEMORIAL FUND Q. HEALTH & SOC'Y 445 (1983); Hay, *supra* note 64.

66. Brenda Berkelaar & Mohan Dutta, A Culture-Centered Approach to Crisis Communication 7 (Nov. 15, 2007) (unpublished manuscript); Button, *supra* note 3, at 144–45; Hay, *supra* note 64.

67. S. Ravi Rajan, *Missing Expertise, Categorical Politics, and Chronic Disasters: The Case of Bhopal*, *in* CATASTROPHE & CULTURE, *supra* note 2, at 237.

In the migration context, the voices of the migrants themselves are rarely heard in the public debate.[68]

The crisis lens often masks what has been termed "missing expertise."[69] In other words, crises are constructed in situations where the "potential for risk is not matched by a concomitant creation of expertise and institutions with the wherewithal to help mitigate a crisis."[70] Rather than encouraging the creation of permanent institutions that might prevent future crises, the emergency rhetoric focuses attention on temporary solutions.

Migration emergencies are no different from other crises in this regard. They are generally portrayed as unexpected and unmoored from structural causes. Yet an interesting paradox arises. At the same time that existing institutions are perceived as inadequate to address the crisis, extreme faith is placed in existing adjudication processes to determine appropriately who should be protected.[71]

The crisis lens obscures the complex and long-term structural causes of international migration.[72] These include poverty and underdevelopment, food insecurity, cycles and structures of violence, and natural disasters,[73] not to mention complicated global power relations.[74] Only by concealing these complexities is it possible to depict migration as an individual choice. In reality, the autonomy of many migrants is severely constrained by circumstance.[75]

Crisis rhetoric also, and more importantly for the purposes of this Article, obscures the role of international migration law in creating and perpetuating ineffective yet intransigent structures that shape modern migration flows. While a variety of factors contribute to the construction of migration crises, the particular impact of international law remains underexplored and undertheorized.

In the international law literature, scholars have for some time pointed to crisis as a central driver of the development of international law. Some favor this approach: Michael Reisman has argued that international law teaching and scholarship should be focused on crises or

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68. Michael Martinez & Jaqueline Hurtado, *Central American Immigrant Parents Agonize When Child Crosses Border Alone*, CNN (June 22, 2014, 10:48 PM), http://www.cnn.com/2014/06/21/us/central-american-family-agony-child-border-crossings.

69. Rajan, *supra* note 67, at 237.

70. *Id.*

71. *See* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013).

72. Benjamin Authers & Hilary Charlesworth, *International Human Rights Law and the Language of Crisis* 22 (RegNet Research Paper No. 2013/18, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2364212.

73. McAdam, *supra* note 10, at 11.

74. Chantal Thomas, *Transnational Migration, Globalization, and Governance: Reflections on the Central America-United States Immigration Crisis* 2–4 (Cornell Law Sch., Research Paper No. 14-26, 2014).

75. *Id.*

"incidents."[76] Hilary Charlesworth critically examines the crisis focus of international law, arguing that it limits the questions we ask, and "shackles international law to a static and unproductive rhetoric."[77] She explores the ways in which crisis drives the field of international humanitarian law, and in a later piece argues that crises galvanize, sustain, and undermine international human rights law.[78] Sonja Starr has questioned the "exclusive crisis focus" of international criminal law, suggesting an expansion to include non-crisis-linked crimes.[79] Recently, Diane Otto has asked whether queer and feminist theory and activism can be used to "turn the momentum of crisis to more progressive ends."[80] She suggests that "un-crisis" thinking is needed "to find liberatory solutions to international problems by using international law."[81] This Article draws from these critical perspectives on the role of crisis in the development of international law, and pushes them a step further by exploring the role of international law in constructing migration crises. This Article takes as a starting point that crisis does in fact drive the development of the law, and adds to that analysis by emphasizing the ways in which the structure and content of international law help to give rise to crises.

III. The Architecture of International Migration Law[82]

Migration is a relative newcomer to the arena of international cooperation.[83] Historically, decisions about the admissions of migrants onto a state's territory have been viewed as squarely within the authority of individual states—in other words, an authority with which international law must not interfere. Indeed, some observers have characterized migration law as "the last bastion of sovereignty."[84] The conceptualization

76. W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, *in* International Incidents: The Law That Counts in World Politics 15 (W. Michael Reisman & Andrew R. Willard eds., 1988).

77. Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 Mod. L. Rev. 377, 377 (2002).

78. Authers & Charlesworth, *supra* note 72, at 2–3.

79. Sonja Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 Nw. U. L. Rev. 1257, 1258 (2007).

80. Dianne Otto, *Decoding Crisis in International Law: A Queer Feminist Perspective*, *in* International Law and Its Discontents: Confronting Crisis 115, 135 (Barbara Stark ed., 2015).

81. *Id.* at 135.

82. The use of the term "architecture" references Alex Aleinikoff's description of the international law of migration as "substance without architecture." T. Alexander Aleinikoff, *International Legal Norms on Migration: Substance Without Architecture*, *in* International Migration Law: Developing Paradigms and Key Challenges 467 (Ryszard Cholewinski et al. eds., 2007).

83. Vincent Chetail, *The Transnational Movement of Persons Under General International Law—Mapping the Customary Law Foundations of International Migration Law*, *in* Research Handbook on International Law and Migration 1, 5 (Vincent Chetail & Céline Bauloz eds., 2014) [hereinafter Research Handbook].

84. Catherine Dauvergne, *Sovereignty, Migration and the Rule of Law in Global Times*, 67 Mod. L. Rev. 588, 588 (2004).

of international migration law as a field is a relatively recent phenomenon—the field itself can only be described as nascent.

The underdetermined architecture of international migration law sits uneasily atop massive global flows of human beings. The vast majority of migrants and migration routes are barely, if at all, governed by international law. While international law has played a significant role in coordinating global trade, communications, and even finance, it has made few inroads when it comes to the movement of people. Even at its most generous, international law does not provide access to territory for migrants; the best it has to offer is protection against return to those who manage to enter a state of their own accord. International law has struggled in particular to formulate a coherent approach to migrants who move en masse, as is the case in most situations labeled migration emergencies.

A. A Deconstructivist Field of Law

The various strands of international law that address the movement of people across national borders are not generally conceptualized as a unified field.[85] Like deconstructivist architecture, this set of laws is fragmented and accidental; lacking a clear purpose, the field is "trapped and distorted by forms that have emerged from within it."[86] The international law of migration is currently best described as an effort to integrate theoretically several existing subfields, including forced migration law, human rights law, humanitarian law, international labor law, law of trafficking, trade law, and the law of the sea. This law can be found in international and regional agreements as well as a large body of soft law developed through a variety of treaty executives and consultative processes.[87] The important point for this Article is that this legal framework

85. Vincent Chetail has described international migration law as "a giant unassembled juridical jigsaw puzzle," which is in the early stages of mapping and still awaits an overarching theory or design. Chetail, *supra* note 83, at 1 (quoting Richard Lillich, The Human Rights of Aliens in Contemporary International Law 122 (1984)).

86. The Museum of Modern Art, Deconstructivist Architecture 3 (June 1988), http://www.moma.org/momaorg/shared/pdfs/docs/press_archives/6559/releases/MOMA_1988_0062_63.pdf ("The hallmark of deconstructivist architecture is its apparent instability. . . . [T]he projects seem to be in states of explosion or collapse. . . . The original house thus becomes a strange artifact, trapped and distorted by forms that have emerged from within it."); *Deconstructivist*, Art & Architecture Thesaurus Online, http://www.getty.edu/vow/AATFullDisplay?find=deconstructivist&logic=AND&note=&english=N&prev_page=1&subjectid=300112407 (last visited Mar. 11, 2017) ("[T]he style is characterized by a purposeful displacement of structural elements, resulting in buildings with no specific purpose."); Joseph Giovannini, *The Limit of Chaos Tempts a New School of Architects*, N.Y. Times, Feb. 4, 1988, at C1 (describing deconstructivist designs as ones that "look fragmented and accidental . . . they break a building into seemingly unrelated parts: walls don't meet floors; door frames are distorted.").

87. Thomas, *supra* note 74, at 15. The term "treaty executives" refers to international bodies that oversee the implementation of treaties through a variety of mechanisms, including the issuance of periodic reports detailing state parties' compliance with treaties, individualized complaint mechanisms, and the promulgation of guidance on interpreting treaties. *See generally* Tara J. Melish, *From Paradox*

fails to establish mechanisms for the safe and orderly movement of people across borders, regardless of the reasons for migrating. Deeply deferential to national immigration laws, international migration law does little to overcome exclusionary domestic and regional migration regimes.

Apart from forced migration law, discussed in more detail later, the field of international migration law includes at minimum the law of the sea, international human rights law, international labor law, international trade law, and transnational criminal law. While these bodies of law offer some protections to migrants, they do not offer any means of safe passage or entry for migrants fleeing violence or poverty, no matter how severe, or for migrants seeking to fill labor market needs.

International human rights law provides a set of general protections applicable to all, but does not include among its offerings the right to safe passage or entry or even the right to remain for migrants fleeing generalized violence or poverty, or seeking employment.[88] Once they have entered a country, migrants in theory should be able to invoke human rights law to prevent mistreatment, but without the right to remain, migrants' fears of deportation are a formidable obstacle to exercising these human rights protections.[89] In short, human rights law does not enable the type of safe and regular movement that would be needed to forestall migration emergencies, and instead defers to domestic immigration laws.

International labor law is similarly inadequate in enabling orderly and predictable migration flows. Though the International Labour Organization ("ILO") has promulgated three treaties relating to labor migration, these have been largely ratified by sending states rather than receiving states.[90] The political opposition to setting standards for labor

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to Subsidiarity: The United States and Human Rights Treaty Bodies, 34 YALE J. INT'L L. 389 (2009) (discussing such international bodies involvement with treaty implementation).

88. *See generally* Jaya Ramji-Nogales, *Undocumented Migrants and the Failures of Universal Individualism*, 47 VAND. J. TRANSNAT'L L. 699 (2014) (detailing the limitations of international human rights law protections for undocumented migrants); Vincent Chetail, Essay, *The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights*, 28 GEO. IMMIGR. L.J. 225, 245–53 (2013) (detailing the limitations on the fundamental rights of migrants under international human rights law); Gregor Noll, *Why Human Rights Fail to Protect Undocumented Migrants*, 12 EUR. J. MIGRATION & L. 241 (2010) (examining international human rights law and its lack of influence on migrants fleeing violence).

89. Ramji-Nogales, *supra* note 88.

90. Forty-nine states ratified the Migration for Employment Convention: Albania, Algeria, Armenia, Bahamas, Barbados, Belgium, Belize, Bosnia and Herzegovina, Brazil, Burkina Faso, Cameroon, Cuba, Cyprus, Dominica, Ecuador, France, Germany, Grenada, Guatemala, Guyana, Israel, Italy, Jamaica, Kenya, Kyrgyzstan, Madagascar, Malawi, Malaysia – Sabah, Mauritius, Moldova, Republic of, Montenegro, Netherlands, New Zealand, Nigeria, Norway, Philippines, Portugal, Saint Lucia, Serbia, Slovenia, Spain, Tajikistan, Tanzania Zanzibar, The former Yugoslav Republic of Macedonia, Trinidad and Tobago, United Kingdom, Uruguay, Venezuela, Bolivarian Republic of, Zambia. *C097 – Migration for Employment Convention (Revised), 1949 (No. 97)*, INT'L LABOUR ORG. (Jan. 22, 1952), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312242:NO.

migration in receiving states has largely stalled such efforts;[91] creating means and mechanisms for entry and safe passage have not even made it to the table. The 1949 ILO Convention No. 97 on Migrant Workers, which was widely ratified, was drafted largely for the benefit of receiving countries.[92] Later conventions providing robust and detailed protections for migrant workers have been "generally ignored" by the international community, particularly receiving countries.[93] The same is true of the International Convention on the Rights of All Migrant Workers and Their Families.[94] Despite a variety of treaties and a relatively robust treaty executive, international labor law does little to enable a rational system of labor migration or to change the law and policy of migrant-receiving states.

The story is similar when it comes to international trade law.[95] Though the General Agreement on Trade in Services ("GATS") of the World Trade Organization ("WTO") has the potential to govern the cross-border movement of people, it does so only indirectly.[96] GATS Mode 4, as it is known, is limited in scope to citizens of one WTO member state temporarily providing a service in the territory of another member state.[97] The agreement does not cover labor migrants seeking employment, nor

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Twenty-three states ratified the Migrant Workers Convention: Albania, Armenia, Benin, Bosnia and Herzegovina, Burkina Faso, Cameroon, Cyprus, Guinea, Italy, Kenya, Montenegro, Norway, Philippines, Portugal, San Marino, Serbia, Slovenia, Sweden, Tajikistan, The former Yugoslav Republic of Macedonia, Togo, Uganda, Venezuela, Bolivarian Republic of. *C143 – Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)*, INT'L LABOUR ORG. (Dec. 9, 1978), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312288:NO.

Twenty-three states ratified the Domestic Workers Convention: Argentina, Belgium, Bolivia, Plurinational State of, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Finland, Germany, Guyana, Ireland, Italy, Jamaica, Mauritius, Nicaragua, Panama, Paraguay, Philippines, Portugal, South Africa, Switzerland, Uruguay. *C189 – Domestic Workers Convention, 2011 (No. 189)*, INT'L LABOUR ORG. (Sept. 5, 2013), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:2551460:NO.

91. Virginia A. Leary, *Labor Migration*, *in* MIGRATION AND INTERNATIONAL LEGAL NORMS, *supra* note 82, at 229.

92. *Id.* at 232.

93. RYSZARD CHOLEWINSKI, MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT 135 (1997).

94. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, July 1, 2003, 2220 U.N.T.S. 3.

95. *See, e.g.*, Chantal Thomas, *Convergences and Divergences in International Legal Norms on Migrant Labor*, 32 COMP. LAB. L. & POL'Y J. 405, 434 (2011) (noting that trade law does not address irregular migration).

96. Joel P. Trachtman, *Economic Migration and Mode 4 of GATS*, *in* RESEARCH HANDBOOK, *supra* note 82, at 346; Michele Klein Solomon, *GATS Mode 4 and the Mobility of Labour*, *in* INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES 107 (Ryszard Cholewinski et al. eds., 2007).

97. Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, opened for signature Apr. 15, 1994, 1867 U.N.T.S. 3 (entered into force Jan. 1, 1995) ("General Agreement on Trade in Services"), Annex on movement of natural persons supplying services under the Agreement.

does it impact member states' laws concerning migration status.[98] The Annex to the agreement is also limited in authority.[99] Most member states have selected not to obligate themselves to increasing access for movement of people across the board, instead creating entry opportunities largely for intra-corporate transferees and highly skilled labor.[100] In other words, admissions criteria are left to member states. International trade law has a minimal influence on the content of entry decisions.[101] The trade realm, which justifies the reduction of barriers to movement of goods and capital on the resultant benefits for the global economy, holds promise for enabling labor migration.[102] Trade scholars recognize the importance of "facilitating the movement of people in an orderly, predictable, and safe manner," yet compared to commitments on goods, technology, and other services, WTO member states have made little progress in coordinating around movement of people.[103]

Given the prominence of maritime routes in contemporary migration flows, one might expect the international law of the sea to govern the movement of people more effectively, yet this body of law largely defers to domestic migration laws. The law of the sea is a complex body of law composed of several treaties and agreements.[104] The U.N. Convention on the Law of the Sea divides the seas into three zones: (1) territorial seas within twelve nautical miles from the coast over which states may exercise numerous sovereign rights, including enforcing immigration laws;[105] (2) contiguous zones beyond the territorial sea and within twenty-

98. *Movement of Natural Persons*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/serv_e/mouvement_persons_e/mouvement_persons_e.htm (last visited Mar. 11, 2017) ("It does not concern persons seeking access to the employment market in the host member, nor does it affect measures regarding citizenship, residence or employment on a permanent basis.") Though it is extremely difficult to accurately measure migrant flows under Mode 4, "available estimates suggest that trade through Mode 4 remains a very small component of overall trade in services, accounting for between 1 and 2 percent of the total." *Id.*

99. *Id.* ("Overall, the degree of Mode 4 access that has been bound is quite shallow.").

100. *Id.* ("In addition to limiting access to certain categories of persons, other restrictions frequently inscribed in schedules include: defined duration of stay; quotas, including on the number or proportion of foreigners employed; 'economic needs tests' (a test that conditions market access upon the fulfilment of certain economic criteria) or 'labour market tests,' generally inscribed without any indication of the criteria of application; pre-employment conditions; residency and training requirements.").

101. Sophie Nonnenmacher, *International Trade Law and Labour Mobility*, *in* FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 312, 312–14 (Brian Opeskin et al. eds., 2012).

102. For one proposal of such a trade regime, see Thomas Straubhaar, *Why Do We Need a General Agreement on Movements of People (GAMP)?*, *in* MANAGING MIGRATION: TIME FOR A NEW INTERNATIONAL REGIME? 110, 129–33 (Bimal Ghosh ed., 2000).

103. Steve Charnovitz, *Trade Law Norms on International Migration*, *in* MIGRATION AND INTERNATIONAL LEGAL NORMS, *supra* note 82, at 241.

104. For a superb explanation of the law of the sea and its relationship to migrant smuggling, see ANNE T. GALLAGHER & FIONA DAVID, THE INTERNATIONAL LAW OF MIGRANT SMUGGLING 227–49 (2014).

105. United Nations Convention on the Law of the Sea arts. 2, 3, 19(2)(g), 25, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. The UNCLOS has been ratified by 166 states and the European Union. There is an exception known as the "right of innocent passage" that enables foreign vessels to pass

four nautical miles from the coast in which states may also protect immigration laws;[106] and (3) the high seas, where states have jurisdiction only over vessels flying their flag, with few exceptions.[107] This legal framework determines the authority of coastal states, transit states, and states with vessels flying their flag to exercise jurisdiction over the seas, fulfilling a coordination function. The substance of the law applied is left largely, though not entirely, to domestic standards.[108]

The law of the sea is also concerned with safety, and to that end, it introduces substantive legal obligations of rescue. Several treaties mandate that states require ships flying their flag to assist people in distress at sea to the extent they are able without endangering their own ship.[109] Coastal states must create arrangements with other states in their region to rescue people in distress at sea near their coasts.[110] But nothing in the law of the sea determines where migrants rescued at sea should be disembarked.[111] Where asylum seekers and refugees are involved, the need to avoid the threat of persecution "is a consideration."[112] As discussed further below, refugee law does not offer clear guidance as to whether its *non-refoulement* protections apply on the high seas, beyond the territory of the state.[113] Moreover, though they are in theory governed by very different international legal regimes, the rescue obligations may in practice be difficult to distinguish from interdiction, an entitlement granted to states under the Migrant Smuggling Protocol to prevent the unauthorized entry of migrants onto their territory.[114] In

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through territorial seas, but passage is not "innocent" if the vessel loads or unloads any person contrary to the immigration laws and regulations of the coastal state. *Id.* art. 19(2)(g).

106. *Id.* art. 33. For further discussion of immigration enforcement in the contiguous zone, see Natalie Klein, *Assessing Australia's Push Back the Boats Policy Under International Law: Legality and Accountability for Maritime Interceptions of Irregular Migrants*, 15 MELB. J. INT'L L. 414, 420–21 (2014).

107. UNCLOS, *supra* note 105, arts. 86, 89, 92.

108. GALLAGHER & DAVID, *supra* note 104, at 237.

109. UNCLOS, *supra* note 105, art. 98; International Convention for the Safety of Life at Sea, Annex ch. V, reg. 33, Nov. 1, 1974, 1184 U.N.T.S. 278 (2007 revision) [hereinafter SOLAS]; Convention on the High Seas art. 12(a), Sept. 30, 1962, 13 U.S.T. 2312; International Convention on Salvage art. 10, Apr. 28, 1989, 1953 U.N.T.S. 165.

110. UNCLOS, *supra* note 105, art. 98; SOLAS, *supra* note 109, reg. V/7; International Convention on Maritime Search and Rescue, Annex ¶ 2.1.10, Apr. 27, 1979, 1405 U.N.T.S. 119.

111. Klein, *supra* note 106, at 427–28; JOANNE VAN SELM & BETSY COOPER, THE NEW "BOAT PEOPLE": ENSURING SAFETY AND DETERMINING STATUS 36 (2005); *see* Frederick J. Kenney, Jr. & Vasilios Tasikas, *The* Tampa *Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea*, 12 PAC. RIM L. & POL'Y J. 143, 156–59 (2003). Note that this was published prior to the most recent revisions to the Maritime Search and Rescue Convention.

112. Int'l Mar. Rescue Found., Res. MSC.167 (78), *Guidelines on the Treatment of Persons Rescued at Sea*, ¶ 6:17 (adopted May 20, 2004).

113. For an argument that the *non-refoulement* protection against torture applies extraterritorially, see GALLAGHER & DAVID, *supra* note 104, at 264.

114. Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime art. 8, Jan. 28, 2004, 2241 U.N.T.S. 507 [hereinafter Protocol Against Smuggling of Migrants]; GALLAGHER & DAVID, *supra* note 104.

short, the substantive additions are limited yet the interaction of several bodies of law may make them confusing to implement.

There have been some additional successful efforts to talk across the different fields of law that relate to migrants at sea, most notably in the Guidelines on the Treatment of Persons Rescued at Sea, which references the U.N. Refugee Convention.[115] Similarly, the International Maritime Organization included the U.N. High Commissioner for Refugees in its review of safety measures.[116] Though far from comprehensive, these steps demonstrate the possibility of better coordination between different aspects of international migration law.

Transnational criminal law does provide a binding legal framework relevant to international migration, but takes a carceral and exclusionary approach. The 2000 U.N. Convention Against Transnational Organized Crime and its protocols on human trafficking and smuggling lay out legal standards that define and prohibit certain behavior with respect to the movement of people.[117] Most states parties have complied with these obligations through domestic laws that criminalize human trafficking, migrant smuggling, and related activities.[118] While impressively detailed and widely adopted, the transnational criminal law framework addresses only one narrow set of issues relating to international migration. Moreover, these laws engage with the symptoms rather than the root causes of migration—they have little impact on the forces that drive people to move, and simply criminalize some forms of movement.[119] Transnational criminal law, like the other subfields of international law previously discussed, does not offer safe and lawful routes of migration.

Like deconstructivist architecture, the field of international migration law is characterized by fragmentation and unpredictability. There are numerous strands of law that purport to regulate the movement of people, but none offer any actual route let alone means of entry into another country. Alone in this dispersed field of weak norms stand the powerful but constricted protections of the principle of *non-refoulement.*

B. THE BRICK TOWNHOUSE OF *NON-REFOULEMENT*

Alongside these scattered and relatively weak norms stands the robust but narrow principle of *non-refoulement*, embodied in both

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115. Res. MSC.167 (78), *supra* note 112, Annex 34.

116. Int'l Maritime Org. [IMO], A. 920 (22), *Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea* (Jan. 22, 2002); VAN SELM & COOPER, *supra* note 111, at 25–26.

117. United Nations Convention Against Transnational Organized Crime & the Protocols Thereto, Dec. 15, 2000, 2225 U.N.T.S. 209 (including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, 2237 U.N.T.S. 319); Protocol Against Smuggling of Migrants, *supra* note 114.

118. *See* ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING 500 (2010); GALLAGHER & DAVID, *supra* note 104.

119. GALLAGHER, *supra* note 118, at 501.

international refugee law and international human rights law. In contrast to the incoherence that characterizes the rest of international migration law, the protection of refugees and those fleeing torture is a well defined, well established rule to which most states have bound themselves. The principle of *non-refoulement* is also supported by well funded and capable institutions that perform a variety of executive functions.[120] This is arguably one of the best developed and most highly functioning areas of international human rights law, but protects only a fortunate few.

The principle of *non-refoulement* can trace its authority both to treaty law and to customary international law; it also benefits from a robust body of soft law developed by treaty executives. The norm against return to persecution was originally set out in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol and extended to non-return to torture through the 1984 U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[121] Some argue that the principle of *non-refoulement* is a *jus cogens* norm; regardless of whether that characterization is accurate, it has undoubtedly been incorporated into customary international law.[122] One hundred forty-eight states have agreed that they will not expel individuals who fear serious mistreatment on the basis of their membership in a racial, religious, national, political, or particular social group.[123] Similarly, 159 states offer protection against deportation to those who are at serious risk of suffering torture at the hands of or with the acquiescence of a government official.[124]

Though impressively effective, this is a narrow approach to protection of migrants.[125] Only those who can establish that they meet the relatively

120. Several examples of such organizations include the UNHCR, the U.N. Committee Against Torture, and the U.N. Human Rights Commission.

121. 1951 Refugee Convention, *supra* note 12, arts. 32–34; Convention Against Torture, *supra* note 14, art. 3.

122. Chetail, *supra* note 83. *But see* GALLAGHER & DAVID, *supra* note 104 (noting that the customary international law status of *non-refoulement* in the context of asylum from persecution is disputed by at least one expert on international refugee law, Professor James Hathaway).

123. *Status of the Convention Relating to the Status of Refugees*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V2&chapter=5&Temp=mtdsg2&clang=_en (last visited Mar. 11, 2017) (providing real-time status of the convention); *Status of the Protocol relating to the Status of Refugees*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&clang=_en (last visited Mar. 11, 2017) (providing real-time status of the convention); *see* U.N. HIGH COMM'R FOR REFUGEES, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL (last updated June 28, 2011), http://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html (noting that 148 states are parties to one or both of these treaties).

124. *Status of Ratification: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, http://indicators.ohchr.org (last visited Mar. 11, 2017) (providing real-time status of the convention). To view the status of the Convention Against Torture in particular, select the correct convention name from the "select a treaty" dropdown. *See id.*

125. Paz, *supra* note 18, at 3.

stringent requirements of the refugee definition or the Convention Against Torture standard are able to invoke the principle of *non-refoulement.* Migrants fleeing generalized violence, extreme poverty, and natural disasters are not covered. Women seeking to protect themselves and their children from severe gang violence may or may not be refugees; the 1951 Convention could hardly have envisaged such cases, which as a result fit uneasily into its framework.[126] Migrants who face torture at the hands of non-state actors—gang members, cartels, militias—may or may not be protected against return.[127] Those seeking a better life for themselves and their families face the invidious label "economic migrants"; defined in opposition to refugees, they are by implication unworthy of lawful entry, let alone protection.

Moreover, international refugee law has very little to say about the procedural aspects of refugee determination. The Refugee Convention and the Convention Against Torture set out the applicable substantive legal standards, but do not provide any guidance as to the process through which these claims should be determined. This is particularly problematic in the case of mass influx, a situation that the drafters of the Refugee Convention recognized but refused to address in the treaty text. As a result, the "crisis" label often enables the use of expedited procedures in systems that were already dubious in terms of fairness of process. The legalization of these fundamentally political issues changes the debate from one of holistic morality to questions about whether any adjudication process was made available to the migrants. This is problematic because of both the resultant focus on access to process rather than fairness of process, and more importantly because very few people see what happens inside the black box of the law. Rather than engaging in a debate about whose responsibility it is to prevent death and other serious forms of human suffering, it is possible to wash our hands as a society of these challenging questions if the applicant is determined not to fit into the refugee categories. Once access to the process is enabled, it is in the hands of the experts—there is no need to think about whether not only the categories for protection but also the process used to award that protection is fair.

The treaty language and customary international law norms are also narrow in their applicability. They do not require states to open their borders to those fleeing persecution and torture. In other words, there is no right to safe passage from the country in which mistreatment is feared to a safe country. The protections of the Refugee Convention and the

126. *See, e.g.*, *In re* M-E-V-G-, 26 I. & N. Dec. 227 (B.I.A. 2014); *In re* W-G-R-, 26 I. & N. Dec. 208 (B.I.A. 2014).

127. Protection under the Convention Against Torture is available only where the torture is "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Convention Against Torture, *supra* note 14, art. 1(1).

Convention Against Torture are extended only to those who have entered a state's territory. Once inside, the principle of *non-refoulement* prevents return, but it does not offer a key to the door. There is some contestation around the question of how this doctrine is applied to migrants interdicted on the high seas. While the European Court of Human Rights recently held that states must individually assess the protection claims of these migrants, the U.S. Supreme Court has found no such obligation.[128]

While the principle of *non-refoulement* offers robust protections, they are available only to the select few who are able to enter the territory of another state and can fit within the strict definitions set out in the relevant treaties. These powerful yet narrow norms define the field. Other migrants are defined in relation to refugees and those protected under the Convention Against Torture. They are judged deficient regardless of the authenticity of their need or the severity of their vulnerability. The limited options for safe and orderly movement encourage irregular migration, or migration outside the law.

C. The Scary Basement of Mass Influx

The narrow protections of *non-refoulement* play a role in constructing migration crises by encouraging movement outside of formal legal channels, whether by land or by sea. International migration law compounds this problem by failing to address how to process mass flows of migrants (with the exception of regional human rights law in Europe).[129] By failing to provide adequate guidance for states, the law forfeits an important coordination function. Given that the structure of international migration law provides few means for migrants to move in a more regularized fashion, the concomitant failure to address the therefore inevitable appearance of mass groups of migrants at land and sea borders is yet another factor in the construction and perpetuation of migration crises.

Though (or perhaps because) the Refugee Convention was drafted at a time when large groups of displaced persons existed throughout Europe, the treaty does not address the question of how to process mass influxes of migrants that may include refugees. The same year the Refugee Protocol was drafted, the U.N. General Assembly indicated that mass influx may be an exception to the principle of *non-refoulement*, reflecting discomfort expressed by states that did not want to be forced

128. *Compare* Hirsi Jamaa v. Italy, App. No. 27765/09, Eur. Ct. H.R. (2012) (holding that Articles 13 and Protocol 4, Article 4 of the European Convention on Human Rights require Italy to provide individual assessment of asylum claims for applicants intercepted at sea), *with* Sale v. Haitian Ctrs. Council, 509 U.S. 155 (1993) (holding that the U.N. Refugee Convention did not oblige U.S. officials to individually process asylum claims from Haitians intercepted in international waters before returning them to Haiti).

129. *See Hirsi Jamaa*, App. No. 27765/09.

to admit large groups of migrants.[130] International human rights treaties, including the Convention Against Torture, are similarly silent on questions of mass influx. International humanitarian law largely mirrors international refugee law on this point. Prohibiting return and forcible deportation of those fearing persecution, it does not address the processes or standards that should apply to situations of mass influx.[131]

Beyond the treaty law, mass movements of migrants are addressed through two types of international law approaches: soft law offering guidance to states and multilateral processes using euphemisms such as "migration management" with the aim of eliminating such movement. The U.N. High Commissioner for Refugees plays an outsize role in developing soft law on international migration, which it then seeks to enforce through its robust programs and standing within the international community. This process of norm development constructs a relatively powerful but narrow approach to mass influx.

1. The U.N. Convention Relating to the Status of Refugees

The drafters of the Refugee Convention, working under the specter of mass influx, treated the issue as a scary basement to which the door must remain firmly shut. In the wake of World War II, more than 850,000 displaced persons were living in camps for displaced persons in Austria, Germany, and Italy.[132] France had received half a million refugees during the Spanish Civil War.[133] Rather than engaging with this recent experience to devise a humanitarian approach, the drafters refused to include protections for migrants during mass movements let alone for safe passage to the country of refuge.

The Preamble to the Refugee Convention originally included strong language about the right to "recognition everywhere as a person before the law" and the mandatory obligation to provide refugees with legal status "that will enable [them] to lead a normal and self-respecting life."[134] The same draft included a provision that required all parties to "give

130. G.A. Res. 2312 (XXII), United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law, art. 2(2) (Dec. 14, 1967).

131. *See* David James Cantor, Opinion, *Does IHL Prohibit the Forced Displacement of Civilians During War?*, 24 INT'L J. REFUGEE L. 840 (2012); David James Cantor, *Forced Displacement, the Law of International Armed Conflict, and State Authority*, *in* RESEARCH COMPANION TO MIGRATION LAW, THEORY AND POLICY (Satvinder S. Juss ed., 2012); David James Cantor, *Laws of Unintended Consequence? Nationality, Allegiance and the Removal of Refugees During Wartime*, *in* REFUGE FROM INHUMANITY? WAR REFUGEES AND INTERNATIONAL HUMANITARIAN LAW (David James Cantor & Jean François Durieux eds., 2014).

132. THE REFUGEE CONVENTION, 1951: THE TRAVAUX PREPARATOIRES ANALYSED WITH A COMMENTARY BY DR. PAUL WEIS 16 (1995) [hereinafter THE REFUGEE CONVENTION].

133. *Id.*

134. U.N. Secretary-General, *U.N. Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons*, U.N. Doc. No. E/AC32/2, Annex Preliminary Draft Convention Relating to the Status of Refugees (and Stateless Persons), pmbl. (Jan. 3, 1950) [hereinafter *Status of Refugees and Stateless Persons*]; THE REFUGEE CONVENTION, *supra* note 132, at 12.

favourable consideration" to the right of asylum seekers to access their territory.[135] Moreover, parties agreed to "relieve the burden assumed by initial reception countries . . . *inter alia*, by agreeing to receive a certain number of refugees in their territory."[136]

A working group with representatives from Belgium, Canada, France, Israel, the United States, and the United Kingdom substantially revised the preamble to focus on the need to "revise and consolidate existing international agreements relating to the protection of refugees."[137] In anticipation of future situations of mass influx, the French representative attempted to insert language referencing the need for international cooperation to redistribute refugees globally and requiring states parties to cooperate with the U.N. to implement the Refugee Convention.[138] This language was watered down substantially in the final version, eliminating references to redistribution of refugees and encouraging rather than requiring cooperation with the U.N. High Commissioner for Refugees.[139]

Perhaps unsurprisingly, the drafters viewed mass influx as a national security issue rather than a humanitarian problem. For example, they included in the provision on freedom of movement of refugees unlawfully present, language permitting restrictions "which are necessary" in order to enable states to address "a great and sudden influx of refugees."[140] This provision would enable states to hold refugees in camps until they were granted a residence permit.[141]

The drafting states stamped out any suggestion that the Refugee Convention might offer a means of entry into a state, especially in situations of mass influx.[142] During the drafting of Article 32, the *non-refoulement* provision at the heart of the Refugee Convention, the Swiss representative limited the scope of this protection to "refugees who had already entered a country . . . [so that] States would not be compelled to allow large groups of persons seeking refugee status to cross its frontiers."[143] The Dutch representative supported this approach, expressing discomfort with "assuming unconditional obligations so far as a mass influx of refugees was concerned, unless international collaboration was sufficiently organized to

135. *Status of Refugees and Stateless Persons*, *supra note* 134, art. 3.

136. *Id.*

137. U.N. Econ. & Soc. Council, *Ad Hoc Committee on Statelessness and Related Problems, Draft Convention Relating to the Status of Refugees: Decisions of the Working Group Taken on 9 February 1950*, U.N. Doc. No. E/AC.32/L.32, at 1 (Feb. 9, 1950); *see* THE REFUGEE CONVENTION, *supra* note 132.

138. THE REFUGEE CONVENTION, *supra* note 132, at 20–30.

139. 1951 Refugee Convention, *supra* note 12, pmbl.

140. THE REFUGEE CONVENTION, *supra* note 132, at 217; 1951 Refugee Convention, *supra* note 12, art. 31.

141. THE REFUGEE CONVENTION, *supra* note 132, at 220.

142. *Id.* at 234 (quoting the Swiss representative as saying, "Article 28 covered only refugees residing lawfully in a country and not those who applied for admission or entered the country without authorization," referencing what is now Article 32, the *non-refoulement* provision).

143. *Id.* at 236.

deal with such a situation."[144] The Italian representative added, "a State could not commit itself not to expel or to return large groups of refugees who presented themselves on its territory, and who might endanger national security."[145] The Swedish, German, and Belgian representatives agreed with this approach, and made clear that their approval of the provision depended upon this interpretation.[146]

States' fears of mass influx informed the construction of the Refugee Convention. Responding to recent experiences of mass flows of migrants throughout Europe, the drafters firmly closed the door to protection-based approaches to processing large groups of migrants and to enabling safe passage for migrants fleeing harm. But shutting the door on the problem did not magically make it disappear. The issue of mass influx has arisen repeatedly since the drafting of the Convention and continues to be one of the central migration problems of our day. The structure of the Refugee Convention and of international migration law more generally has left a gaping void in terms of treaty law. As discussed in a subsequent Subpart, the UNHCR has created soft law directed at the symptoms of migration emergencies, but not at the root causes.

2. *UNHCR Executive Committee Conclusions*

The UNHCR's Executive Committee Conclusions are a central mechanism for creating soft law in the international refugee law arena. The Executive Committee of the UNHCR was established in 1959 as a subsidiary organ of the U.N. General Assembly.[147] Among other functions, the Executive Committee "[d]etermine the general policies under which the High Commissioner . . . plan[s], develop[s] and administer[s]" its programs.[148] Composed of representatives of ninety-eight member states, the Executive Committee holds annual sessions from which it promulgates Conclusions on International Protection of Refugees.[149] Beginning in 1979,

144. *Id.*

145. *Id.* at 237.

146. *Id.* at 237–38.

147. U.N. Economic and Social Council Resolution E/RES/672 (XXV) ¶ 2(a) (Apr. 30, 1958) [hereinafter Establishment of the Executive Committee] (referencing G.A. Res. 1166) ("Establishment of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees"); G.A. Res. 1166 (XII), International Assistance to Refugees Within the Mandate of the United Nations High Commissioner for Refugees ¶ 5 (Nov. 26, 1957); *see* G.A. Res. 428(V) art. 3, Statute of the Office of the United Nations High Commissioner for Refugees (Dec. 14, 1950) ("The High Commissioner shall follow policy directives given to him by the General Assembly or the Economic and Social Council.").

148. Establishment of the Executive Committee, *supra* note 147, ¶ 2(a); G.A. Res. 1166 (XII), *supra* note 147, ¶ 5(b).

149. *The Executive Committee's Origins and Mandate*, U.N. HIGH COMMISSIONER FOR REFUGEES, http://www.unhcr.org/en-us/executive-committee.html (last visited Mar. 11, 2017); *UNHCR Executive Committee of the High Commissioner's Programme: Composition for the Period October 2016 – October 2017*, U.N. HIGH COMMISSIONER FOR REFUGEES, http://www.unhcr.org/en-us/excom/scaf/574808a4/list-members-observers-2016-2017.html (last visited Mar. 11, 2017); Exec. Comm. of the High Comm'rs Programme, 64th

the Executive Committee has issued conclusions directly addressing the arrival of mass movements of migrants at state borders.

Early conclusions suggested temporary refuge as the preferred approach to mass influx and emphasized that the principle of *non-refoulement* still applied to such situations.[150] Recognizing mass influx as an ongoing problem, in 1980 the High Commissioner convened an expert group to study the issue and suggest solutions.[151] This group reiterated that mass influx was a growing phenomenon and suggested that states adopt a set of minimum standards to address these situations.[152] Given that some migrants within these mass movements are genuine refugees, the Executive Committee suggested that states admit these migrants temporarily in order to determine which fall within the refugee definition. The temporary refuge recommendation was extended to asylum seekers at sea through a subsequent conclusion promulgated in the same year.[153] During this temporary admission period, it proposed that states should provide asylum seekers with a variety of basic protection measures, including the preservation of family unity and access to courts.[154] The Executive Committee later included the provision of identity documents in this set of protection measures.[155]

Twenty-three years later, in 2004, the Executive Committee addressed the question of mass influx again. For the first time, it defined mass influx to include

> some or all of the following characteristics: (i) considerable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption or response capacity in host States, particularly during the emergency; (iv) individual asylum procedures, where they exist, which are unable to deal with the assessment of such large numbers.[156]

The Executive Committee also suggested that states and other actors create comprehensive multilateral and bilateral plans of action to prepare for mass influxes. It specified the types of measures that should be included in such plans: emergency financial and technical assistance; consultation mechanisms for involved states, the UNHCR, and other organizations; support to host countries to register and document refugees; procedures to assess asylum claims; and security measures,

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Session, *Rules of Procedure*, U.N. Doc. No. A/AC.96/187/Rev.8 (Oct. 29, 2013); *see* OFFICE OF THE U.N. HIGH COMM'R FOR REFUGEES, DIV. OF INT'L PROTECTION, A THEMATIC COMPILATION OF EXECUTIVE COMMITTEE CONCLUSIONS (7th ed. 2014).

150. U.N. EXEC. COMM. ON THE INT'L PROTECTION OF REFUGEES, CONCLUSIONS ADOPTED BY THE EXECUTIVE COMMITTEE ON THE INTERNATIONAL PROTECTION OF REFUGEES 8, 22–24, 30–31 (1975–2004), http://www.unhcr.org/41b041534.html (looking particularly at Conclusions No. 6, 15, and 19).

151. *Id.* at 30.

152. *Id.* at 36.

153. *Id.* at 41.

154. *Id.* at 36.

155. *Id.* at 61.

156. *Id.* at 253.

including identifying and disarming combatants and preparations for evacuation. The Executive Committee suggested that these plans of action should include review mechanisms.[157]

Though the Executive Committee's Conclusions are aimed at improving the situation of asylum seekers during mass influx situations, they of course do nothing to minimize the creation of such situations in the first place. Refugee law generally is in a reactive rather than proactive posture: Rather than seeking to resolve structural problems that create outflows of migrants or to provide these migrants with safe passage to their destination, it offers a safe haven for these migrants once they have crossed an international border. In other words, refugee law addresses the symptoms but not the causes of migration crises.

3. International and Regional Migration Regimes

In addition to soft law, several international and regional mechanisms coordinate state approaches to mass influx. These processes focus on the exchange of information and facilitation of network development among government officials from different states, rather than creating safe and predictable means of migration.[158] At the global level, these groups have pulled together a broad range of participants and perspectives, increasing interaction and engagement but lacking the authority to create binding obligations let alone enforcement powers. Here we see a relatively egalitarian process but limited results. At the regional level, the regimes may be more binding, but focus on preventing migration rather than creating safe migration processes.

On the international stage, the International Organization for Migration ("IOM") might seem the obvious home for efforts to coordinate state responses to migration. With 165 member states,[159] the IOM's mission includes "meeting the growing operational challenges of migration management" and "uphold[ing] the human dignity and well-being of migrants."[160] Unfortunately, due to historical resistance on the part of the United States and other countries, the IOM has never gained independent power as an institution.[161] Its constitutive structure is fundamentally deferential to the laws and policies of migrant-receiving states. The first

157. *Id.*

158. *About RCPs*, INT'L ORG. FOR MIGRATION, http://www.iom.int/about-rcps (last visited Mar. 11, 2017).

159. *Members and Observers*, INT'L ORG. FOR MIGRATION, http://www.iom.int/members-and-observers (last visited Mar. 11, 2017).

160. *Mission*, INT'L ORG. FOR MIGRATION, http://www.iom.int/mission (last visited Mar. 11, 2017).

161. Alexander Betts, *Global Migration Governance* 6, 9 (Glob. Econ. Governance Programme, GEG Working Paper No. 2008/43, 2008); Fabian Georgi, *For the Benefit of Some: The International Organization for Migration and Its Global Migration Management*, *in* THE POLITICS OF INTERNATIONAL MIGRATION MANAGEMENT 45, 48 (Martin Geiger & Antoine Pécoud eds., 2010); J. Benton Heath, Competition, Duty, and Virtue in International Organizations 5 (Nov. 6, 2014) (unpublished manuscript) (on file with Author).

article of the IOM Constitution states, "control of standards of admission and the number of immigrants to be admitted are matters within the domestic jurisdiction of states, and, in carrying out its functions, [IOM] shall conform to the laws, regulations and policies of the States concerned."[162] The IOM's funding structure,[163] dependent on voluntary donor contributions for each operational project, enables wealthy migrant-receiving states to enlist the organization in enforcing "politically motivated and often morally dubious immigration policies."[164] Rather than developing international norms around migration and establishing safe migration routes, the IOM focuses on capacity building and operational support.[165]

The IOM has also created international and regional processes that bring together stakeholders to discuss migration issues. The Global Migration Group ("GMG") attempts to coordinate the work of U.N. agencies and other international organizations addressing migration issues. Founded by the IOM as the informal Geneva Migration Group in 2003, U.N. Secretary-General Kofi Annan transformed this body into a larger and more formal organization in 2006.[166] The GMG convenes the heads of twenty international organizations to "encourage the adoption of more coherent, comprehensive and better coordinated approaches to" international migration and regional law and policy.[167] It holds regular meetings and issues frequent publications and statements. The Global Forum on Migration and Development is a "voluntary, informal, non-binding and government-led process" open to all U.N. member states and observers, aimed at dialogue and cooperation around migration and development.[168] The Global Forum focuses on practical outcomes such as enabling discussions between policymakers and other stakeholders, creating best practices, identifying information gaps, establishing partnerships, and

162. *Constitution and Basic Texts of the Governing Bodies*, art 1(3), INT'L ORG. FOR MIGRATION (2014), http://publications.iom.int/system/files/pdf/iomconstitution_en.pdf.

163. *Organizational Structure*, INT'L ORG. FOR MIGRATION, http://www.iom.int/organizational-structure (last visited Mar. 11, 2017).

164. Heath, *supra* note 161, at 9; *see* Georgi, *supra* note 161, at 62–63.

165. Georgi, *supra* note 161, at 47–48.

166. *Id.* at 58.

167. *About*, GLOBAL MIGRATION GROUP, http://www.globalmigrationgroup.org/what-is-the-gmg (last visited Mar. 11, 2017). Participating U.N. agencies include: the Food and Agriculture Organization, International Labor Organization, International Organization for Migration, Office of the High Commissioner for Human Rights, Conference on Trade and Development, Department of Economic and Social Affairs, Development Programme, Educational, Scientific, and Cultural Organization, Population Fund, High Commissioner for Refugees, Children's Fund, Institute for Training and Research, Office on Drugs and Crime, Regional Commissions, University, Entity for Gender Equality and the Empowerment of Women, World Bank, and the World Health Organization. *Id.*

168. *The GFMD Process*, GLOBAL F. ON MIGRATION & DEV., http://www.gfmd.org/process (last visited Mar. 11, 2017).

structuring priorities.[169] Its participants are drawn from a broad range of government agencies plus civil society representatives. While these organizations convene a broad range of stakeholders, they are not capable of making the types of needed changes to the international migration law regime.

There are currently eighteen active regional consultative processes ("RCPs") on migration, many of which are supported by the IOM informally.[170] The RCPs assemble governments, international organizations, and in some cases non-governmental organizations ("NGOs") for informal exchanges of information and nonbinding dialogue on migration-related issues.[171] Some of these processes are explicitly focused on preventing and discouraging irregular migration flows while others prioritize "respect for the human rights of migrants regardless of their status."[172] But none aim to restructure the field of international migration law in a way that would enable orderly movement of people, thereby forestalling many migration emergencies.

Over the past year E.U. lawmakers have created two legal institutions aiming to address migrant flows across the Mediterranean. Neither can be classified as successful. The first program offers a classic "burden-sharing" approach to relocate asylum seekers from states that have received the largest influxes equitably across the European Union. In September 2015, relying on the emergency response provision of the Treaty on the Functioning of the European Union, the Council of the European Union promulgated a decision that sought to relocate forty percent of the asylum seekers who entered Italy and Greece in 2014 (54,000 people) by the end of September 2016, and an additional 66,000

169. *Background and Objectives*, GLOBAL F. ON MIGRATION & DEV., http://www.gfmd.org/process/background (last visited Mar. 11, 2017).

170. *RCPs by Region*, INT'L ORG. FOR MIGRATION, http://www.iom.int/rcps-region (last visited Mar. 11, 2017). The currently active RCPs are: the 5+5 Dialogue on Migration in the Western Mediterranean, the Abu Dhabi Dialogue, the Bali Process, the Almaty Process, the Arab Regional Consultative Process; the Budapest Process, the Colombo Process, the Inter-governmental Authority on Development-RCP, the Common Market for Eastern and Southern Africa, the Intergovernmental Consultations on Migration, Asylum and Refugees, the Migration Dialogue for Central African States, the Migration Dialogue for Southern Africa, the Migration Dialogue for West Africa, the Mediterranean Transit Migration Dialogue, the Prague Process, the Puebla Process, the Rabat Process Euro-African Dialogue on Migration and Development RCP, and the South American Conference on Migration. *Id.*; Georgi, *supra* note 161, at 55.

171. *Regional Consultative Processes on Migration*, INT'L ORG. FOR MIGRATION, http://www.iom.int/regional-consultative-processes-migration (last visited Mar. 11, 2017).

172. The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crimes falls in the former group. *About the Bali Process*, BALI PROCESS, http://www.baliprocess.net/ (last visited Mar. 11, 2017). As does the Migration Dialogue for Southern Africa. *MIDSA*, INT'L ORG. FOR MIGRATION, http://www.iom.int/midsa (last visited Mar. 11, 2017). The South American Conference on Migration or Lima Process falls in the latter group. *SACM*, INT'L ORG. FOR MIGRATION, http://www.iom.int/sacm (last visited Mar. 11, 2017). The Puebla Process does as well. *The Regional Conference on Migration or Puebla Process*, REGIONAL CONF. ON MIGRATION, http://www.rcmvs.org/descripcion.htm (last visited Mar. 11, 2017).

asylum applicants thereafter.[173] Member states were provided with 6000 Euros per migrant they accepted.[174] Yet as of September 15, 2016, fewer than 5000 refugees had been relocated from Italy and Greece, and fewer than 15,000 places (of the 160,000 that had agreed) were made available in the twenty-five E.U. nations participating in the relocation mechanism.[175]

Even if member states had been willing to relocate migrants, the European Union's approach contains serious flaws. The Council's decision frowns upon "secondary movement," requiring member states to discourage migrants from moving from their relocation country to another country.[176] The migrant camp in Calais known as "The Jungle" demonstrates the limitations of this approach. There, migrants who prefer to live in Britain, most because of language abilities and family ties, wait in a self-created camp by the Eurotunnel for an opportunity to jump on a truck or a train, rather than seeking protection in France.[177] Surely it makes better economic sense for the destination countries to find matches in terms of language skills and family resources on which these migrants can rely while they restart their lives.

The second, and perhaps better known, arrangement is the European Union-Turkey migrant transfer deal. On March 18, 2016, the European Union and Turkey entered into an agreement that, as of March 20, all undocumented migrants traveling from Turkey to Greece were to be returned to Turkey.[178] For every Syrian returned to Turkey from Greece, one Syrian would be resettled into the European Union.[179]

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173. Council Decision 2015/1601, art. 4(2), 2015 O.J. (L 248) 80, 88 (EU) (establishing provisional measures in the area of international protection for the benefit of Italy and Greece); Consolidated Version of the Treaty on the Functioning of the European Union art. 78(3), Dec. 13, 2007, 2012 O.J. (C326) 47, 77 ("In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament."); Council Decision 2015/1601, *supra*, arts. 3(2), 5(7) (requiring a European Union-wide grant rate of seventy-five percent specifically under art. 3(2). These relocated migrants are limited to nationals of countries with high asylum grant rates across the European Union, and exclude those who can be reasonably viewed as a danger to national security or public order. *Id.*

174. Council Decision 2015/1601, *supra* note 173, art. 10(1)(a). Member states may also request temporary suspension of the relocation plan if they face exceptional circumstances. *Id.* art. 4(5).

175. EURO. COMM'N, MEMBER STATES' SUPPORT TO EMERGENCY RELOCATION MECHANISM (AS OF 2 FEBRUARY 2017), http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf (last visited Mar. 11, 2017).

176. Council Decision 2015/1601, *supra* note 173, pmbl. ¶ 38 (requiring member states to take measures to avoid secondary movements of relocated asylum seekers).

177. Anders Fjellberg, Opinion, *What to Do About the Refugees in Calais?*, N.Y. TIMES (Sept. 28, 2015), http://www.nytimes.com/2015/09/29/opinion/what-to-do-about-the-refugees-in-calais.html.

178. *European Commission – Fact Sheet, EU-Turkey Statement: Questions and Answers*, EUR. COMMISSION (Mar. 19, 2016), http://europa.eu/rapid/press-release_MEMO-16-963_en.htm [hereinafter *European Commission - Fact Sheet*]. For a critical analysis of the deal, see Elizabeth Collett, *The Paradox of the EU-Turkey Refugee Deal*, MIGRATION POL'Y INST. (Mar. 2016), http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal.

179. *European Commission – Fact Sheet*, *supra* note 178.

Turkey further agreed to prevent new migration routes from Turkey to the EU.[180] The sizeable benefits for Turkey included a promise to accelerate the end of visa requirements for Turkish nationals entering the European Union, which was to happen by the end of June 2016, and the disbursement of a total of six billion Euros in funding for refugee assistance over two years.[181] The political instability in Turkey following the attempted coup in July 2016 put the deal into some question, though talks continue around visa liberalization.[182] Most recently, the European Union agreed to provide direct cash transfers to cover the needs of refugees in Turkey, funded by 348 million Euros from the European Union and member states. Aiming to reach one million of Turkey's three million refugees by the first quarter of 2017, these funds will take the form of monthly cash transfers to electronic cards held by refugees.[183] The deal has been widely criticized as possibly violating international law, and is morally dubious in any case.[184]

The European Union has also developed several programs that link migration between Africa and Europe with development efforts. In November 2014, the European Union and several North African nations launched the Khartoum Process, also known as the EU-Horn of Africa Migration Route Initiative.[185] This program aims to target irregular migration and criminal networks through information sharing and national capacity building in the Horn of Africa region around migration management. This capacity building will include prevention measures, including information campaigns against irregular migration as well as enhancing national law enforcement agencies. The initiative will also create a regional framework to return migrants to their home countries and will provide technical assistance with reception centers and asylum processes for migrants in the Horn of Africa region.[186] Though the program will also promote sustainable development and emphasizes human rights protections for vulnerable migrants, critics express concern

180. *Id.*

181. *Id.*

182. Laurence Norman, *EU-Turkey Talks Dial Down Risk to Migration Deal*, WALL ST. J. (Sept. 3, 2016, 10:42 AM), http://www.wsj.com/articles/eu-turkey-talks-dial-down-risk-to-migration-deal-1472906150.

183. Press Release, European Comm'n, EU Announces More Projects Under the Facility for Refugees in Turkey: €348 Million in Humanitarian Aid to Refugees in Turkey (Sept. 8, 2016, 10:42 AM), http://europa.eu/rapid/press-release_IP-16-2971_en.htm.

184. ASSOC. PRESS, *Elders Slam EU-Turkey Migrants Deal as Bad Precedent*, VOICE OF AMERICA (Sept. 13, 2016, 9:52 AM), http://www.voanews.com/a/elders-european-union-turkey-migrants-deal/3505308.html; Collett, *supra* note 178.

185. EU-HORN OF AFR. MIGRATION ROUTE INITIATIVE, DECLARATION OF THE MINISTERIAL CONFERENCE OF THE KHARTOUM PROCESS (2014) [hereinafter DECLARATION OF THE MINISTERIAL CONFERENCE]. This followed the Rabat Process, a dialogue that began in 2006 and focused on dialogue and cooperation around the western migratory route. *Rabat Process*, RABAT PROCESS: EURO-AFRICAN DIALOGUE ON MIGRATION & DEV., https://processus-de-rabat.org/en/ (last visited Mar. 11, 2017).

186. DECLARATION OF THE MINISTERIAL CONFERENCE, *supra* note 185.

that this is simply a cover for the European Union's efforts to externalize its border—a particularly worrisome development given the human rights records of many of the countries in the region. Notably, the process does not mention safe transit routes.

In November 2015, the European Council called the Valletta Summit, a dialogue with key nations involved in migration from Africa and Europe.[187] The Action Plan resulting from this meeting lists five priority domains: (1) development and root causes of migration of all types; (2) promoting lawful migration; (3) protecting all migrants; (4) preventing irregular migration, migrant smuggling, and trafficking; and (5) improving cooperation on return, readmission, and reintegration.[188] At the Summit, the European Commission launched the Emergency Trust Fund for stability and to address root causes of irregular migration and displaced persons in Africa. Focused on countries across the major African migration routes to Europe, the fund draws from a €1.8 billion contribution from the European Union as well as contributions from member states.[189] Critics expressed concerns about the focus on preventing migration and outsourcing border control without increased opportunities for safe transit.[190]

IV. The Legal Construction of Migration Crises

The architecture of international migration law contributes to the legal construction of migration emergencies.[191] Rather than offering a coherent and comprehensive approach to the movement of people across borders, international law presents a generally fragmented and weak field,

187. *Valletta Summit on Migration, 11-12/11/2015*, Eur. Council (last updated July 20, 2016), http://www.consilium.europa.eu/en/meetings/international-summit/2015/11/11-12/.

188. *Id.*

189. Eur. Comm'n, A European Agenda on Migration: A European Union Emergency Trust Fund for Africa (2015), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/2_factsheet_emergency_trust_fund_africa_en.pdf.

190. *EU-Africa Migrant Plan Raises Worrying Questions*, IRINNews.org (Nov. 12, 2015), http://www.irinnews.org/report/102210/eu-africa-migrant-plan-raises-worrying-questions; Press Release, Amnesty Int'l, EU-Africa Summit in Valletta Must Not Dress up Border Control as 'Co-Operation' (Nov. 10, 2015), http://www.amnesty.eu/en/news/press-releases/all/eu-africa-summit-in-valletta-must-not-dress-up-border-control-as-co-operation-0941/#.Vo6tQ1LZZME; *EU/AU: Put Rights at Heart of Migration Efforts*, Hum. Rts. Watch (Nov. 9, 2015, 7:00 PM), https://www.hrw.org/news/2015/11/09/eu/au-put-rights-heart-migration-efforts.

191. After this Article was complete, but before it went to press, the U.N. General Assembly adopted the New York Declaration for Refugees and Migrants. This document contains two proposals for new treatises relating to international migration. The first proposes a comprehensive refugee response framework that would apply to "large movements of refugees" to be "developed and initiated" by the UNHCR in coordination with relevant states and stakeholders. G.A. Res. 71/1, annex I, ¶ 2 (Oct. 3, 2016). The second addresses international migration more broadly, and aims to "enhance coordination" on "all aspects of international migration," including "the creation and expansion of safe, regular pathways for migration" and "[c]onsideration of policies to regularize the status of migrants." *Id.* at annex II, ¶¶ 2, 8(e), 8(p). In each case, the goal is to produce a global compact for adoption in 2018, an aim that appears substantially less achievable in the wake of subsequent political developments, including the 2016 U.S. presidential election.

with the exception of the principle of *non-refoulement*. This awkward structure plays a central role in constructing migration emergencies. Migrants have few options but to take risky journeys to seek asylum inside the borders of destination states, whatever their reason for moving. The power and rhetoric of *non-refoulement* obscure the exclusionary regimes that prevent lawful movement for the vast majority of the world's migrants. To compound the problem, international migration law is characterized by extreme path dependence, which leads to a situation in which law consumes not only rationality but also morality.

Law, by its nature, creates path dependence. Law set outs principles through legislation or jurisprudence that bind future parties and actors to a balance struck at a specific point in time. This framework then determines the outcome of future cases and guides future behavior. If these principles are well chosen, the law performs its function effectively for some period of time, enabling coordination or preventing conflict. It is inevitable that a given law's effectiveness will diminish at some future time when that law is no longer appropriate in the face of societal changes. In the ideal scenario, at this point when the path chosen by the prior law is no longer optimally effective, we will see a change in the law through new legislation or jurisprudence.

International law has few mechanisms for such progressive development. In the field of migration law, available mechanisms to update the law are insufficient to correct dangerous path dependence. The field is dominated by a treaty aimed at protecting those fleeing the Nazi regime or communism. Indeed, the Refugee Convention was originally limited to the protection of those who fled events occurring before January 1, 1951. This temporal restriction was lifted by the U.N. Protocol Relating to the Status of Refugees in 1967,[192] but the refugee definition remained the same, as it does nearly sixty-five years later.

The world has changed dramatically since 1951. Global geopolitics is nearly unrecognizable, as are many social norms. With the end of the Cold War, violence is often perpetrated by non-state actors—gang members, militias, cartels—rather than by states. The intentions of these actors are complex and often difficult to parse, but the harm they perpetrate is undeniable. With the rise of a global world economy, many local livelihoods have disappeared, and labor migration is the only realistic employment opportunity. The reasons for migration are multiple and complicated, but the needs of the labor market and dire poverty are inescapable.

Yet international migration law has inscribed and, indeed, reified a structure that bears little resemblance to the world in which we live. Migrants have extremely limited options for safe and lawful movement,

192. *See* sources cited *supra* note 12 and accompanying text.

and very few routes to lawful status in destination states. The rhetoric of *non-refoulement* attracts migrants with its promise and distracts attention from the domestic and regional exclusion regimes that prevent their movement. This is the legal construction of migration emergencies. It is a phenomenon intertwined with, yet distinct from, the social, cultural, or political construction of crisis. The law plays a particularly powerful role in entrenching a set of norms and institutions well beyond their sell-by date. This mismatch of law and reality creates a dangerous path dependence that is difficult to recognize, let alone overcome.

The entrenched legal structures of international migration law consume rationality. Excessive faith in the law and its ability to address current social and political challenges leads to irrational outcomes for both the migrant and the state. Rather than prioritizing protection of or employment opportunities for the most vulnerable, international migration law prioritizes protection and employment of those able to access state territory.[193] Rather than equitably distributing responsibility for protecting migrants based on state resources or admitting migrants based on their ability to fill labor market needs, international migration law relies on geographic proximity as the primary determinant for both decisions. There is no discussion of a rational system of interstate cooperation that would not only allocate migrants to states in a principled fashion but also provide them a safe and lawful means of migrating.

The international legal framework for migration also consumes morality. Excessive faith is placed in the content and process of *non-refoulement*—the law is taken to be an appropriate expression of our moral obligations toward migrants. These beliefs are misplaced on both counts.

The content of refugee law and the principle of *non-refoulement* are outdated at best. Though international soft law and domestic law make updates at the margins, the framework is not suited to the complexities of the modern world. The current law in the United States, for example, does not protect a young man from San Pedro Sula, Honduras, which has the highest murder rate per capita of any city in the world, who was beaten, kidnapped, and assaulted by gang members. These gang members shot at and threw rocks and spears at the young man two to three times a week, threatening to kill him if he did not join.[194] While it might be possible to articulate a defensible moral framework that would prioritize other types of claims over this one, refugee law does not provide any such analysis. It simply fails to include him in preexisting categories, leaving morality to one side. Yet refugee law and the principle of *non-refoulement* are accorded a heavy moral weight—a

193. *See* Paz, *supra* note 18.
194. *In re* M-E-V-G-, 26 I. & N. Dec. 227, 228 (B.I.A. 2014).

weight that they simply cannot bear. The general consensus seems to be that if a person is not determined to be a refugee, we can return them to situations of horrific violence with a clean conscience. This line of moral reasoning works only if the content of refugee law is heavily informed by contemporary morality, which it is not.

Even if the content of refugee law was appropriate for the modern day, determinations of who and who is not a refugee according to the legal standards are made through a process that in most cases is deeply flawed. Again, excessive faith is placed in the "black box" assessments of refugee status. The current law in the United States, for example, extends refugee status to women fleeing domestic violence in countries in which the authorities do not provide adequate protection.[195] This ruling meant that many of the women fleeing Central America are potentially eligible for asylum in the United States. But many of these women, traveling with their minor children, are detained upon arrival and therefore unable to obtain legal assistance in presenting their case. Many have no idea that the domestic violence they had suffered at home would make them eligible to remain in the United States. Beyond the lack of access to counsel, many of these women are subject to brief interviews held in crowded public spaces, often with their small children present. These are not circumstances that would encourage a woman to tell her story of domestic violence. Yet the belief remains that if a person is determined not to be a refugee through this haphazard process, we have met our humanitarian obligation and can return them to severe violence without moral qualms.

International migration law constructs emergencies by entrenching an outdated approach to the movement of people across borders. Without this legal structure dictating outcomes, the political process might have found a different approach more closely tied to both the needs of migrants and the interests of states. But the law's power is blinding. It is all too easy to forget that legal regimes are simply constructs that may or may not be appropriate for contemporary situations. And it is even easier to defer both rationality and morality to the law's determinations despite their inadequacy for the task.

V. A New Blueprint: Global Migration Law

This is a cautionary tale about the blinding power of law and the dangers of legal constructs. In the realm of international migration law, it is possible to imagine a host of alternative approaches that are both more moral and more rational than the current system. The first step would be an open discussion of these options that views the law as simply one possible (and rather inadequate) method of addressing migrant flows

195. *In re* A-R-C-G-, 26 I. & N. Dec. 388 (B.I.A. 2014).

rather than accepting current legal frameworks as foundational and compulsory. This would require a new procedural approach to international migration law. Substantively, an appropriately designed legal system would anticipate migration flows as a part of modern reality. It might reasonably include finding solutions in home countries to minimize migrant outflows, but must also enable safe and lawful journeys as part of a coherent and comprehensive approach to global migration. Such a framework would offer labor migration routes sufficient to meet labor market needs and would focus on protecting the most vulnerable.

A. PROCESS

Any effort to establish a viable international law of migration faces significant challenges. The domestic politics surrounding migration have thus far foreclosed the creation of a supranational legal regime to which states cede substantial authority around questions of admission and residence. Perhaps foremost in the public debate are fears about the impact of migrants on domestic unemployment levels and work conditions as well as drains on public benefits systems.[196] In times of global economic crisis, these concerns loom large. Other public concerns, often but not always presented more subtly, relate to the inclusion of the "other" within domestic societies. Fears of the impact of racial, religious, linguistic, and cultural groups perceived to be invidiously distinct from current populations are implicitly and explicitly invoked by politicians and popular media, and internalized by members of the social polity. These fears are often voiced as concerns about national security or public health. Domestic political constituencies present substantial barriers that must be addressed in any effort to construct a functional international law of migration.

On the international stage, the political obstacles are equally intractable. The migrants with whom this Article is concerned come from nations whose governments have substantially less global economic and political power than those of the countries in which these migrants seek to reside. Indeed, it is because of these very global structural imbalances that migrants leave their home states seeking a more stable political situation or a more promising economic situation, or both. The migrants themselves often come from impoverished or otherwise marginalized groups that have little political voice within their home state, and therefore little ability to pressure their home government to take action on the international stage. Even for those migrants able to motivate their home government to intercede internationally on their behalf, these states are often dependent on migrant-hosting states for financial and

196. Stephen H. Legomsky, *The Removal of Irregular Migrants in Europe and America*, *in* RESEARCH HANDBOOK, *supra* note 83, at 148, 149.

military aid as well as economic trade. Migrant-hosting states have the upper hand and refuse to sign on to international or regional agreements that would place restraints on their ability to control migration flows into their territory.

This bleak situation demands tools of international law that are more innovative than simply amending an existing multilateral treaty regime or crafting a new multilateral treaty. Norms and preferences, both domestic and international, need to be shifted substantially before a long-term, binding multilateral treaty can have any chance of succeeding. Moreover, in order for a newly designed international legal regime to actually regulate current migration flows, contemporary migration law must be altered dramatically. For both of these reasons—the intractable politics and the need for thoughtful yet radical change—a temporary regime is a necessary first step to reforming international migration law. As Jean Galbraith has argued, a "deliberately short-term solution may sometimes be the best way to develop strong, long-term global governance mechanisms."[197]

In an area such as international migration law where many of the most powerful players are unwilling to sign on to a permanent treaty regime that incurs a broad range of obligations, states may be more willing to take on at least some of these obligations on a temporary basis that provides the option of exit.[198] Once it is in place, the temporary regime may help to change norms and preferences around international migration law.[199] If a temporary regime is successful at governing migration flows in a way that is beneficial for both host states (by creating a more predictable, orderly regime) and for migrants (by offering safe and lawful transit routes), states may be more inclined to sign on to a permanent regime. Once states have ceded some sovereignty temporarily, they may learn that there are not only real benefits to international coordination around migration, but also that feared outcomes did not materialize. The temporary regime may slowly help to calm fears of states and populations and normalize international regulation of migration.

The U.N. Security Council might take the lead in putting a temporary international migration regime into place.[200] Under Chapter VII of the Charter of the United Nations, the Security Council has the ability to take a variety of actions to "maintain or restore international peace and security."[201] This authority extends to addressing international migration flows. In October 2015, relying on its Chapter VII powers, the Security Council authorized member states, acting only on the high seas

197. Galbraith, *supra* note 12, at 44.
198. *Id.* at 45–47.
199. *Id.* at 42.
200. Thanks to Jean Galbraith for this suggestion.
201. U.N. Charter art. 39.

off the coast of Libya and only for one year, to seize vessels reasonably suspected of migrant smuggling or human trafficking.[202] This approach has the benefit of sidestepping the lengthy and contentious process of drafting an agreement to create a temporary regime, but of course faces the rather daunting obstacle of obtaining the explicit consent of Security Council member states as well as support from states whose participation is required to ensure the success of such a regime.

This concern points to an important role for non-state actors, from market actors to NGOs, in ensuring the success of a temporary regime.[203] Anne van Aaken suggests that market actors may play an important role in nudging states through their inertia.[204] Though corporations may benefit from employing undocumented migrants at below market wages, the risks of such an approach from both a government enforcement and public relations perspective may outweigh those financial gains. Corporations or associations from industries that employ migrant laborers might be able to encourage states to sign on to an international migration agreement that will lead to more rational and orderly migration. Those corporations as well as states might be influenced by NGOs and migrant advocacy groups through efforts to increase transparency around their employment and treatment of migrant workers. Labor unions might also pressure state actors to regulate migration for employment. The Catholic Church and other religious organizations might have a role to play in encouraging states to sign on to a temporary international migration law regime.[205]

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202. S.C. Res. 2240 (Oct. 9, 2015) (adopted under Chapter VII). As noted in the previous discussion of the law of the sea and transnational criminal law, states are not normally authorized to board foreign vessels in the high seas. The resolution requires states to "make good faith efforts to obtain the consent of the vessel's flag State" before using this authority. *Id.* ¶ 7.

203. *See, e.g.*, Nicola Piper, *Democratising Migration from the Bottom up: The Rise of the Global Migrant Rights Movement*, 12 GLOBALIZATIONS 788, 789 (2015); Peter J. Spiro, *NGOs and Human Rights: Channels of Power*, *in* RESEARCH HANDBOOK ON INTERNATIONAL HUMAN RIGHTS LAW 115 (Sarah Joseph & Adam McBeth eds., 2010).

204. Anne van Aaken, *Is International Law Conducive to Preventing Looming Disasters?*, 7 GLOBAL POL'Y (SPECIAL ISSUE) 81, 90 (2016).

205. *See, e.g.*, *Message of His Holiness Pope Francis for the 101st World Day of Migrants and Refugees (2015)*, LIBRERIA EDITRICE VATICANA (Sept. 3, 2014), https://w2.vatican.va/content/francesco/en/messages/migration/documents/papa-francesco_20140903_world-migrants-day-2015.html.

Regional migration governance might also be a site for experimentation. Thus far, regional migration regimes have served largely to protect the borders of migrant-receiving states, but contemporary migration flows have shown that approach to be unsustainable in the long-term. Existing political and cultural ties make regional frameworks a more familiar option for states, though of course physical proximity and consequent ease of border-crossing may undermine those benefits. NGOs and advocacy networks can play an important role in influencing states to sign on to a temporary regional regime, and geographic and cultural proximity make it easier to coordinate such efforts.[206]

B. SUBSTANCE

Though precise parameters are unrealistic given the complexity of the project, a new approach to international migration law should follow several basic principles in order to regulate migration in a way that is beneficial to host states and to migrants. In two words, the new regime must be *comprehensive* and *proactive.* A new international legal regime must address all of the areas of law that touch on migration. Moreover, it must anticipate migrant flows and enable the safe and orderly movement of human beings across borders. Without these key features, the regime cannot escape the current cycles of crisis and exploitation.

A growing body of literature ably describes the gaps in international law relating to migration as well as their consequences. Darryl Li describes the void of regulation around third-country national migration workers employed by contractors to the U.S. military.[207] Siobhan Mullally paints a similarly grim picture of the international legal protections

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> Migration movements . . . are on such a scale that only a systematic and active cooperation between States and international organizations can be capable of regulating and managing such movements effectively. For migration affects everyone, not only because of the extent of the phenomenon, but also because of "the social, economic, political, cultural and religious problems it raises, and the dramatic challenges it poses to nations and the international community". . . . There are agencies and organizations on the international, national and local level which work strenuously to serve those seeking a better life through migration. Notwithstanding their generous and laudable efforts, a more decisive and constructive action is required, one which relies on a universal network of cooperation, based on safeguarding the dignity and centrality of every human person. This will lead to greater effectiveness in the fight against the shameful and criminal trafficking of human beings, the violation of fundamental rights, and all forms of violence, oppression and enslavement. Working together, however, requires reciprocity, joint-action, openness and trust, in the knowledge that "no country can singlehandedly face the difficulties associated with this phenomenon, which is now so widespread that it affects every continent in the twofold movement of immigration and emigration."

Id. (internal citations omitted).

206. *See* Stefan Rother & Nicola Piper, *Alternative Regionalism from Below: Democratizing ASEAN's Migration Governance*, 53 INT'L MIGRATION 36, 37–38 (2015).

207. Darryl Li, *Offshoring the Army: Migrant Workers and the U.S. Military*, 62 UCLA L. REV. 124, 126 (2015).

available to domestic workers employed by diplomats or international civil servants.[208] Undocumented migrants are particularly vulnerable without sufficient protection from exploitation even under international human rights law.[209] Scholars such as Chantal Thomas and Anna Triandafyllidou have begun to map the interactions of the various international legal regimes that touch on migration, and have demonstrated the gaping holes that remain.[210]

These separate strands of legal regulation should be brought together under one regime that views the migrant as a whole being. Current approaches depict migrants as either vulnerable and in need of protection or as laborers seeking employment. Many migrants may fit into both categories, and should be viewed by the law in all of their complexity. Processing and movement might be expedited for those at imminent risk, but a successful regime must offer options for safe and lawful movement even for migrants seeking a better life. The answer to the question "at imminent risk of what?" is left intentionally vague; the parameters for protecting the vulnerable must be revisited when creating the new regime and open to progressive development or even reframing over time in order to keep up with a changing world.

Legal regulation of migration should also be brought into conversation with economic development policies and organizations.[211] Remittances and diaspora engagement and their influence on development might explicitly be considered as part of the international migration law framework. Similarly, migration and development policy frameworks should include discussions of labor markets and labor migration policies.[212] As will be further discussed later, the European Union has begun to take some steps in this direction.

The international migration law regime must also be proactive. Rather than being viewed as a crisis or even a problem, international migration must be conceptualized as a phenomenon that is permanent and must be addressed in a constructive way.[213] Migrant flows should be

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208. Siobhán Mullally & Clíodhna Murphy, *Double Jeopardy: Domestic Workers in Diplomatic Households and Jurisdictional Immunities*, 64 AM. J. COMP. L. 677 (2016).

209. *See* Chetail, *supra* note 88; Noll, *supra* note 88; Ramji-Nogales, *supra* note 88 (discussing the vulnerability of undocumented migrants).

210. *See generally* Thomas, *supra* note 74; Anna Triandafyllidou & Angeliki Dimitriadi, *Governing Irregular Migration and Asylum at the Borders of Europe: Between Efficiency and Protection*, IMAGINING EUROPE No. 6, May 2014 (discussing the interactions of laws governing irregular migration, labor migration, and asylum in the European Union).

211. ALEXANDER BETTS, DEVELOPMENT ASSISTANCE AND REFUGEES: TOWARDS A NORTH-SOUTH GRAND BARGAIN? 4 (2009).

212. Niels Keijzer et al., *Theory and Practice? A Comparative Analysis of Migration and Development Policies in Eleven European Countries and the European Commission*, 54 INT'L MIGRATION 69, 75 (2016).

213. Comm. for Programme & Coordination, Report of the Office of Internal Oversight Services: Evaluation of the Office of the U.N. High Commissioner for Refugees on Its Fifty-Fifth Session, U.N. Doc. E/AC.51/2015/5 (Mar. 18, 2015).

anticipated and addressed prophylactically or at least as soon as evidence of increased movement is available. A proactive regime could enable safe transit routes for all migrants, whether they are seeking protection or employment or both. The beginnings of such an approach are in place for refugees resettled by UNHCR and the International Organization for Migration, but these processes must be made more efficient and accessible. Migrants moving primarily for employment could contribute to the costs of their movement—indeed, many currently do, paying exorbitant financial and physical prices for their desire to move to markets that need their labor.

Finally, and most importantly, international law must begin to play a role in ensuring safe and lawful transit of migrants from their home countries to their destination countries. Though states have historically been opposed to ceding their sovereignty in this regard, the benefits both to migrants and to migrant-receiving states from such an approach are substantial.

From a consequentialist perspective, the flows of migrants to Europe and to the United States over the past two years have demonstrated the difficulty that wealthy states face in attempting to stop these flows of migrants. Faced with extreme violence and economic desperation, many more migrants will continue to find ways to cross borders despite state efforts to keep them out. In response to the influx of Central American migrants in 2014, the United States implemented not only a strict processing regime at the border, but also worked with Mexican and Central American governments to externalize the border—that is, to interdict potential migrants before they even reach the United States.[214] Despite these efforts, in the fall of 2015, the numbers of Central American families arriving at the southern U.S. border more than doubled.[215] Though the flows of migrants to Europe in 2015 received a warmer welcome from Germany, these migrants' determination,

214. *See, e.g.*, Jesuit Conference of the U.S. and the Wash. Office on Latin Am., *U.S. Support and Assistance for Interdiction, Interceptions, and Border Security Measures in Mexico, Honduras, and Guatemala Undermine Access to International Protection*, submission for Hearing on the Human Rights Situation of Migrant and Refugee Children and Families in the United States before the Inter-American Commission on Human Rights, 153rd Ordinary Period of Sessions 111 (Oct. 27, 2014), https://www.aclu.org/files/assets/iachr_-_human_rights_situation_of_migrant_and_refugee_children_and_families_in_the_united_states-v2.pdf#page=111; JENNIFER PODKUL & IAN KYSEL, INTERDICTION, BORDER EXTERNALIZATION, AND THE PROTECTION OF THE HUMAN RIGHTS OF MIGRANTS 8–9 (2015); GEORGETOWN LAW HUMAN RIGHTS INST., THE COST OF STEMMING THE TIDE: HOW IMMIGRATION ENFORCEMENT PRACTICES IN SOUTHERN MEXICO LIMIT MIGRANT CHILDREN'S ACCESS TO INTERNATIONAL PROTECTION (2015).

215. Jeh Johnson, Sec'y, Dep't of Homeland Sec., Statement on Southwest Border Security: U.S. Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 16 (last updated Oct. 18, 2016), https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016.

technological savvy and sheer numbers enabled them to make their way through states determined to keep them out.[216]

In short, destination states are simply not going to be able to stop migrants from moving, and their capacity to do so appears to be decreasing. Faced with that reality, it is in the economic and security interests of migration-receiving states to determine who enters their country and how. A functioning international migration law regime could enable destination states to make such decisions before migrants leave their home states or regions, and ensure a lawful and orderly transit process that does not overwhelm state institutions.

From a moral perspective, creating safe transit routes is also the right thing to do. As the news media has evidenced amply over the past year, irregular migration creates tremendous human suffering and exploitation. Journeys from home countries to destination countries are dangerous both because of the physical obstacles (violent seas, vast deserts) and because of the violence and extortion they face at the hands of individuals who turn migrants' vulnerability into their advantage.[217] These harms can be minimized, if not eliminated, by a global legal framework and infrastructure that enables migrants to transit safely.[218]

CONCLUSION

International law has thus far failed to adequately regulate the movement of people across borders. A more critical perspective might say that international law has succeeded at keeping migrants out of destination states. Recent massive flows of human beings have demonstrated that the current approach to international migration is unsustainable in the long-term. Though many scholars and advocates view the expansion of refugee law as the solution, this Article argues that the contemporary international migration law regime is actually part of the problem. Its outdated approach helps, alongside other factors, to construct migration emergencies. These crises distract attention from the systemic nature of the problem, focusing energies on specific events that appear to arise from nowhere. But it is the current structure of

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216. *See, e.g.*, MARC R. ROSENBLUM & ISABEL BALL, TRENDS IN UNACCOMPANIED CHILD AND FAMILY MIGRATION FROM CENTRAL AMERICA 1, 3 (2016) (explaining that the resurgence of migration flows in 2015 in the face of increased regional enforcement was due to "powerful push factors in the region and pull factors in the United States" that "overwhelmed" enforcement measures); Nicholas Shmidle, *Ten Borders: One Refugee's Epic Escape from Syria*, NEW YORKER (Oct. 26, 2015), http://www.newyorker.com/magazine/2015/10/26/ten-borders.

217. *See, e.g.*, Sarah Stillman, *Where Are the Children? For Extortionists, Undocumented Migrants Have Become Big Business*, NEW YORKER (Apr. 27, 2015), http://www.newyorker.com/magazine/2015/04/27/where-are-the-children.

218. *See, e.g.*, *"Smugglers Will Always Outwit, Outpace and Outfox the Governments,"* 23 SUR INT'L J. ON HUM. RTS. 77, 80 (2016) (transcribing an interview with U.N. Special Reporter François Crépeau "on the human rights of migrants and the so-called 'migration crisis' in Europe").

international migration law that leaves migrants vulnerable to exploitation and host states subject to massive flows of migrants at their borders. A new system could better address the needs of both migrants and host states. This Article argues for a temporary legal regime that is comprehensive and proactive, treating migration flows as a phenomenon that must be anticipated and regulated in a way that reflects a range of reasons for cross-border movement and offers safe and lawful means of movement for humans who migrate.

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